Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

STATE OF MISSOURI,
Petitioner,

v.

ROBERT R. BROOKS,
Respondent.

On Petition For a Writ of Certiorari
To the Supreme Court of Missouri

PETITION FOR WRIT OF CERTIORARI

CHRIS KOSTER
Attorney General
SHAUN J MACKELPRANG
Chief Counsel, Criminal Div.
Counsel of Record
P. O. Box 899
Jefferson City, MO 65102
shaun.mackelprang@ago.mo.gov
(573) 751-3321

Attorneys for Petitioner

QUESTION PRESENTED

Where the defendant did not invoke his right to remain silent and gave nonresponsive, evasive, and generic exculpatory answers during a lengthy post-*Miranda* interrogation—including statements that he had "nothing to hide" and that he had done "nothing" in reference to the killing of his fiancée—was it a *Doyle* violation for the State to use his post-*Miranda* statement, in its case-in-chief, to show that the defendant had not given a self-defense account or other important details during the post-*Miranda* interrogation; and, on cross-examination, to impeach the defendant's claim that he acted in self-defense?

PARTIES TO THE PROCEEDING

Petitioner, State of Missouri, was the respondent below; respondent, Robert Brooks, was the appellant.

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The Missouri Supreme Court's opinion reversing the trial court's judgment, filed February 23, 2010, and reported at 304 S.W.3d 130 (Mo. 2010), is reprinted in the Appendix ("App.") at A1-A17.

The Missouri Court of Appeals order affirming the trial court's judgment, and the Court of Appeals unpublished memorandum in support of its order, issued March 3, 2009, is reprinted in the Appendix at A18-A27.

JURISDICTION

The Supreme Court of Missouri entered its judgment on February 23, 2010. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law . . . .

Constitution of the United States, Amendment XIV:

> ... No state shall . . . deprive any person of life, liberty or property without due process of law . . . .

STATEMENT OF THE CASE

This petition asks the Court to clarify whether a criminal defendant's nonresponsive, evasive, and generic exculpatory statements—and any pertinent facts omitted from such statements—constitute protected "silence" as that term is contemplated in *Doyle v. Ohio*, 426 U.S. 610 (1976).

In *Doyle*, the Court held that once a person has been arrested and advised of the *Miranda* warnings, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." 426 U.S. at 618. In reaching this conclusion, the Court explained that "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights." *Id.* at 617. "Thus," the Court stated, "every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." *Id.*

Four years later, in *Anderson v. Charles*, 447 U.S. 404 (1980), the Court limited the scope of *Doyle* and held that the State can use voluntary, post-*Miranda* statements to impeach a defendant's trial testimony, even if the State asks about a defendant's failure to tell the police certain details. *Id.* at 408-09. The Court concluded that "[s]uch questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent." *Id.* at 408. The Court acknowledged that "[e]ach of two inconsistent descriptions of events may be said to involve 'silence' insofar as it omits facts included in the other version," but the Court concluded that "*Doyle* does

not require any such formalistic understanding of 'silence[.]' " *Id.* at 409.

Here, a jury found the Respondent, Mr. Brooks, guilty of second-degree murder for killing his fiancée. App. A1-A4. At trial, Mr. Brooks testified that he had shot his fiancée in self-defense. App. A3. The State, in its case-in-chief, presented evidence that Mr. Brooks had—before his arrest and before the *Miranda* warnings—made various false statements about his role in the murder. App. A3-A4. The State also presented evidence that Mr. Brooks had—after the police gave *Miranda* warnings—made a lengthy taped statement, wherein he offered numerous non-responsive, evasive, and generic exculpatory statements when questioned about the murder. App. A3-A4. Mr. Brooks's post-*Miranda* statements included assertions that Mr. Brooks and his fiancée were very close, that Mr. Brooks had "nothing to hide," and that Mr. Brooks had done "nothing" in relation to the murder of his fiancée. App. A3-A4, A31-A47. In referring to these statements during opening statement, in its case-in-chief, in cross-examining Mr. Brooks, and in closing argument, the State pointed out that Mr. Brooks had ultimately told the police nothing of value during the post-*Miranda* interrogation, and that Mr. Brooks had not told the police (as he subsequently claimed at trial) that he had shot his fiancée in self defense. *See* App. A6-A13.

On appeal, the Missouri Court of Appeals rejected Mr. Brooks's claim that the State had committed repeated *Doyle* violations by presenting evidence of Mr. Brooks's post-*Miranda* statements and by pointing out that Mr. Brooks had failed to tell the police that he had shot his fiancée in self-defense. App. A20-A25. The Court of Appeals reasoned that Mr.

Brooks had not elected to remain silent and had elected instead "to make a statement." App. A23. And, citing the Court's opinion in *Anderson v. Charles*, 447 U.S. at 408, the Court of Appeals stated, "If a defendant answers questions or makes a statement while in custody, the right to remain silent and not have the State comment on that silence is waived as to the subject matter of those statements." App. A23. The Court held:

> In this case, the defendant was informed of his constitutional rights, including his right to remain silent. He acknowledged that he understood his right to remain silent. The defendant then voluntarily elected to respond to questions asked by the interviewing officer. By answering the officer's questions, the defendant elected not to remain silent. During the course of the interview, when being questioned about the events of the day and his version of what occurred, the defendant stated, "I don't have nothing to hide. I didn't do nothing at all." We hold that the defendant waived his right to remain silent. The defendant's statement clearly refers to the alleged criminal offense. Accordingly, once the defendant waived his right to remain silent, his silence, and his failure to provide the exculpatory details he later provided at trial, was a fair subject for comment by the prosecutor.

App. A24-A25.

The Supreme Court of Missouri granted Mr. Brooks's application for transfer, and, in reversing and remanding the case for a new trial, the court held that the state had committed multiple *Doyle*

violations by presenting evidence of Mr. Brooks's post-*Miranda* statements and by repeatedly referring to the lack of specific exculpatory information in Mr. Brooks's post-*Miranda* statements. App. A4-A14. The Court held that "[a] general denial of culpability, such as 'I didn't do nothing at all," does not waive the right to remain silent." App. A5. And, citing to footnote 2 in the Court's opinion in *Anderson v. Charles*, the Missouri Supreme Court indicated that the Court had "treat[ed] similar statements as not waiving the right to silence." App. A5.[1] Thus, although he had not remained silent after the *Miranda* warnings, the Missouri Supreme Court held that the State had improperly commented on Mr. Brooks's "silence" by pointing out that Mr. Brooks, in his statements to the police, had not been forthcoming about the events surrounding the murder, and that he had not told the police that he shot his fiancée in self-defense. App. A4-A14.[2] The Court further held that the State's use of the post-*Miranda* interview was error because the police officers' questions—which sought to draw out more information—were themselves *Doyle* violations. App. A11-A12.

The Petitioner, State of Missouri, seeks review of the Missouri Supreme Court's decision because the Missouri Court has adopted a rule that fails to protect the interests that *Doyle* was designed to safeguard. Moreover, in expanding the reach of *Doyle*, the Missouri Court has created and sharpened con-

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[1] As will be discussed below, petitioner disagrees with this characterization of *Anderson v. Charles*.

[2] The substance of Mr. Brooks's post-*Miranda* interrogation, as it was presented to the jury is included in the Appendix App. A31-A47. In stating the facts, the Missouri Supreme Court quoted only two of Mr. Brooks's post-*Miranda* statements.

flicts among the Federal Circuit Courts and state courts of last resort. Finally, the Missouri Supreme Court's new rule has placed an unwarranted and unfair burden on the state's legitimate interest of solving and prosecuting criminal offenses.

REASONS FOR GRANTING THE PETITION

1. The Missouri Supreme Court has adopted an unwarranted expansion of the rule in *Doyle*, and it has misconstrued the decision in *Anderson v. Charles* to incorrectly limit the State's use of voluntary, post-*Miranda* statements.

The Court has consistently applied the rule in *Doyle* to circumstances where the defendant actually elected to remain silent. *See Fletcher v. Weir*, 455 U.S. 603, 606 (1982) ("we have consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him").

Since *Doyle* was decided in 1976, there have been various attempts to expand the scope of its rule. But the Court has consistently limited the rule of *Doyle* to those situations wherein "the defendants, after being arrested . . . received their *Miranda* warnings and chose to remain silent." *See Portuondo v. Agard*, 529 U.S. 61, 74 (2000) (reversing the lower court and declining to expand *Doyle* to prohibit a prosecutor from commenting on the defendant's presence at trial). *See also South Dakota v. Neville*, 459 U.S. 553, 564-66 (1983) (reversing the lower court and declining to expand *Doyle* to prohibit evidence of a defendant's refusing a blood-alcohol test); *Fletcher v. Weir*, 455 U.S. at 605-07 (1982) (reversing the lower court and holding that a defendant can be impeached with post-arrest, pre-*Miranda* silence); *Anderson v. Charles*, 447 U.S. at 408-09 (reversing the lower court and holding that a defendant can be impeached with inconsistent post-*Miranda* statements); *Jenkins*

v. Anderson, 447 U.S. 231, 238-40 (1980) (affirming the lower court and holding that a defendant can be impeached with pre-arrest silence); *Roberts v. United States*, 445 U.S. 552, 561 (1980) (observing that the defendant's post-conviction, presentencing silence bore "no resemblance to the 'insolubly ambiguous' postarrest silence that may be induced by the assurances contained in *Miranda* warnings").

Of particular relevance among these cases is the Court's decision in *Anderson v. Charles*, where the Court limited *Doyle* and held that the government can use voluntary, post-*Miranda* statements to impeach a defendant's trial testimony, even if the State asks about the defendant's earlier failure to include certain details. 447 U.S. at 408-409. As outlined above, the Court held that "[s]uch questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent." *Id.* at 408. The Court admitted that "[e]ach of two inconsistent descriptions of events may be said to involve 'silence' insofar as it omits facts included in the other version," but the Court concluded that "*Doyle* does not require any such formalistic understanding of 'silence[.]' " *Id.* at 409.

Here, as in *Anderson v. Charles*, the defendant, Mr. Brooks, did not remain silent after the police advised him of the *Miranda* warnings. Instead, he gave a lengthy, albeit evasive, statement to the police. App. A31-A47. For instance, he told the police that he and his fiancée were very close and did everything together, he said that he had "nothing to hide" about the murder, and he said that he had done "nothing" in connection with the murder. App. A31-A47. In addition, throughout the interview, Mr.

Brooks attempted to divert the officers who were questioning him by giving them non-responsive and evasive answers. App. A31-A47. Given Mr. Brooks's many responses, it cannot be said that he invoked his right to remain silent. Indeed, except as to certain details—e.g., that he shot his fiancée in self-defense—Mr. Brooks was not silent at all.[3] And as the Court stated in *Anderson*, "a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent." *Id.* at 408.

And, yet, in holding that the State committed repeated *Doyle* violations, the Missouri Supreme Court concluded that Mr. Brooks was, in effect, "silent" during his post-*Miranda* interview. In the court's estimation, Mr. Brooks only gave "[a] general denial of culpability." App. A5. But in attempting to differentiate "general" denials of culpability from all other post-*Miranda* statements, the court has adopted an artificial distinction. Whether general or specific, Mr. Brooks's voluntary statements had probative value. Moreover, there were substantial omissions in his general denials, including, for instance, that Mr. Brooks (as he later claimed at trial) shot his fiancée in self-defense. It was those omissions that the State focused on in presenting its case and in cross-examining Mr. Brooks; and, accordingly, in holding that the State could not highlight the omissions, the Missouri Supreme Court did in this case what the Court would not do in *Anderson*: it adopted a "formalistic understanding of 'silence.' "

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[3] After the interrogation had continued for some time, Mr. Brooks eventually invoked his right to remain silent and the interrogation ceased. App. A47. But, importantly, the State was not permitted to comment on Mr. Brooks's invocation, and it was not permitted to comment on his post-invocation silence. *See* App. A47.

In adopting this expansion of *Doyle*, the Missouri Supreme Court purported to rely on *Anderson*. App. A5 (citing to footnote 2 of *Anderson*). The Missouri Court stated that the Court in *Anderson* had treated statements similar to Mr. Brooks's statements "as not waiving the right to silence." App. A5. But a passing citation to footnote 2 in *Anderson* does not support the expansion of *Doyle* that the Missouri Court has adopted. In footnote 2, the Court pointed out that "*Doyle* analyzed the due process question as if both defendants had remained silent," when, in fact, one of the defendants had, "[w]hen told the reason for his arrest, . . . exclaimed 'you got to be crazy,' or 'I don't know what you are talking about.' " 447 U.S. at 407 n. 2. But this acknowledgement of the two statements that were made by one of the defendants in *Doyle* should not be viewed as an indication that the Court has already decided that such generic statements (or omissions from such statements) can never be commented on by the State.

In fact, what the footnote in *Anderson* makes plain is that the exclamations made by one of the defendants in *Doyle* have never been analyzed by the Court, i.e., they have simply been ignored in favor of treating the case as one involving actual silence. *Id.* ("Both the Court and the dissent in *Doyle* analyzed the due process question as if both defendants had remained silent."). Whether such generic statements (and any concomitant omission) would have been admissible in evidence or would have been available for cross-examination of the defendant is a question that the Court has not directly answered. And it certainly has not been considered in the wake of *Anderson* itself.

It is true that the Court, in footnote 2, also distinguished the generic statements made by one of the defendants in *Doyle* from the more explicit, contradictory statements made in *Anderson*. *Id.* But the Court gave no express indication what importance the difference had—the Court never held that a brief, generic denial, in the nature of an outburst, is equal to post-*Miranda* silence. While the Court readily distinguished the statements in *Doyle* as immaterial to the question presented by the facts in *Anderson*, the Court in *Anderson* had no opportunity to actually consider whether such generic exculpatory statements were admissible as voluntary, post-*Miranda* statements, and whether they had any probative value in the case.

Moreover, here, unlike the brief exclamations by one of the defendants in *Doyle*, Mr. Brooks gave an extensive post-*Miranda* statement, wherein he made numerous evasive and nonresponsive statements and various exculpatory statements about his conduct in killing his fiancée. As such, even if a post-*Miranda* statement must be "substantive" (and not merely the types of exclamations made by one of the defendants in *Doyle*), there is a legitimate question whether the Missouri Supreme Court should have relied on the footnote from *Anderson* to expand the reach of *Doyle* under the facts of Mr. Brooks's case.[4] Indeed, in light of Mr. Brooks's multiple false statements both before and after *Miranda* warnings, the State's comments about Mr. Brooks's omissions were not comments on protected silence; rather, they were comments on the

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[4] In fact, in reaching conflicting results, both the Missouri Court of Appeals and the Missouri Supreme Court relied on this Court's opinion in *Anderson v. Charles*. App. A5, A23.

fact that he told another incomplete and false story after receiving the *Miranda* warnings.

In sum, by characterizing Mr. Brooks's omissions as "silence," and in holding that omissions from a post-*Miranda* statement cannot be remarked upon unless the post-*Miranda* statement is something more than "[a] general denial of culpability," the Missouri Supreme Court has expanded *Doyle* beyond its terms and unduly limited the State's use of voluntary post-*Miranda* statements.

II. The Missouri Supreme Court's expansion of *Doyle* is unwarranted, as it divorces *Doyle* from its dual aims of holding the State to its promises and of excluding evidence that lacks probative value.

The Missouri Supreme Court's expansion of *Doyle* is also unwarranted, as it divorces *Doyle* from the interests that the rule in *Doyle* was designed to protect. As stated above, the Court has routinely limited *Doyle* to situations where a defendant has invoked the right to remain silent after receiving the *Miranda* warnings. This limitation makes sense, for when a defendant actually remains silent, the rule of *Doyle* protects two legitimate interests: first, the notion of fair play—it violates due process to use a defendant's silence after assuring the defendant that he or she can lawfully remain silent; and second, the truth-seeking function of the court—evidence of mere silence should not be used to prove guilt or to impeach a defendant because it is, in light of the *Miranda* warnings, "insolubly ambiguous." *See Doyle v. Ohio*, 426 U.S. at 617-18.

Here, Mr. Brooks was not induced to remain silent by the *Miranda* warnings. Instead, after the police gave the warnings, Mr. Brooks talked at length with the police officers and made various incomplete and misleading statements about his role in the murder. App. A31-A47. In other words, in expanding *Doyle* to cover Mr. Brooks's situation, the Missouri Supreme Court has offered *Doyle*'s protective shield not merely to a person who remains silent due to the assurances of *Miranda*, but also to any person who speaks about the crime generally but is not truthful or forthcoming about the facts. This is completely at odds with *Doyle* and subsequent cases, which have extended *Doyle*'s protective shield only to those defendants who—in reliance on the express assurances of *Miranda*—elect to remain silent. *See Roberts v. United States*, 445 U.S. at 561 (declining to expand *Doyle* to circumstances where the defendant's conduct bore "no resemblance to the 'insolubly ambiguous' postarrest silence that may be induced by the assurances contained in *Miranda* warnings.").

As an example, in *Fletcher v. Weir*, the Court refused to expand *Doyle* to a situation involving postarrest silence where no *Miranda* warnings had been given. There, the lower court had held that "a defendant cannot be impeached by use of his postarrest silence even if no *Miranda* warnings had been given." 455 U.S. at 604. The lower court reasoned that "an arrest, by itself, is governmental action which implicitly induces a defendant to remain silent." *Id.* at 606. The Court reversed, observing first that, "as in other post-*Doyle* cases, we have consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him." *Id.* The Court then held that, "In

the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." *Id.* 607. *See Jenkins v. Anderson*, 447 U.S. at 239-41 (impeachment with the defendant's pre-arrest, pre-*Miranda* silence was proper).

Similarly, in a case where the defendant receives the *Miranda* warnings, but does not elect to remain silent, there is no induced silence to protect, and the due process concern of holding the State to its promises is not implicated. Thus, here, where Mr. Brooks made statements post-*Miranda* --and where he was informed that his statements could be used against him—it cannot be said that the State violated due process by then using Mr. Brooks's post-*Miranda* statements. The rule in *Doyle* is simply not applicable to such circumstances. *See Wainwright v. Greenfield*, 474 U.S. 284, 291 (1986) ("*Doyle* rests on 'the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.' ").

A second interest protected by the rule in *Doyle* is the truth-seeking function of the trial court. As the Court stated in *Doyle*, a defendant's silence after the *Miranda* warnings is "insolubly ambiguous." 426 U.S. at 617. This is so because a person's silence might have been caused by a desire to hide the truth, or it might have been caused by the *Miranda* warnings themselves. This "insoluble" ambiguity robs post-*Miranda* silence of any real probative value and, thus, weighs against the State in balancing whether the State's actions are permissible.

But where, as here, the defendant does not remain silent after receiving *Miranda* warnings, and where the defendant instead offers evasive, incomplete, and exculpatory responses, the "silence" that is the defendant's omissions is not insolubly ambiguous. The ambiguity is dispelled because, in answering questions posed by the police, the defendant raises the expectation that he or she will tell the truth and provide important details to the police. *See generally Roberts v. United States*, 445 U.S. at 557-58 ("This deeply rooted social obligation [to assist authorities in uncovering crimes] is not diminished when the witness to crime is involved in illicit activities himself. Unless his silence is protected by the privilege against self-incrimination, . . . the criminal defendant no less than any other citizen is obliged to assist the authorities."). *See also Jenkins v. Anderson*, 447 U.S. at 237-38 (the Fifth Amendment "privilege cannot be construed to include the right to commit perjury . . . . [] and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process") (quoting *Harris v. New York*, 401 U.S. 222, 225 (1971)).

And, indeed, once a defendant offers information to the police—and particularly where the defendant makes exculpatory statements—any "silence" or omitted fact is highly probative, for it legitimately shows that the defendant initially had no valid explanation for his conduct, that the defendant was conscious of his guilt, and that any subsequent (different) exculpatory story was fabricated in the interval between the first and later accounts. *See generally Brecht v. Abrahamson*, 507 U.S. 619, 628-29 (1993) ("It was entirely proper—and probative—for the State to impeach his testimony by pointing

out that petitioner had failed to tell anyone before the time he received his *Miranda* warnings at his arraignment about the shooting being an accident. Indeed, if the shooting was an accident, petitioner had every reason—including to clear his name and preserve evidence supporting his version of the events—to offer his account immediately following the shooting.").

The facts of the present case aptly illustrate the probative value of Mr. Brooks's so-called "silence" during the post-*Miranda* interrogation. Immediately after the murder, Mr. Brooks called 911 and told the 911 operator that he had just shot his fiancée, thinking that she was an intruder in the house. App. A3. The 911 operator transferred Mr. Brooks to the police, and Mr. Brooks repeated his false story. App. A28-A31. Mr. Brooks explained: "Yeah, she turned the f---ing light on, and I didn't know who it was. I fell asleep." App. A30. He continued: "I didn't know who she was. I told her, don't wake me up." App. A30.[5] After the police arrived, Mr. Brooks was overheard talking to his mother on the telephone; he told her that "they were sleeping and that [the victim] got up and continued the argument and then she was shot." App. A3. Mr. Brooks was also overheard talking on the telephone to a friend (who happened to be a police officer in another city); Mr. Brooks told that officer that he and the victim argued for about forty-five minutes. App. A3, A47. At no point during any of these accounts did Mr. Brooks tell anyone that he had shot his fiancée in self-defense after she pulled a gun on him. Thereafter, Mr. Brooks agreed to go to the police station for an interview. App. A3. After the

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[5] The Missouri Supreme Court left this false statement out of its recitation of the facts.

Miranda warnings, Mr. Brooks was interrogated at length. In that interview, Mr. Brooks said that he had "nothing to hide," that he had done "nothing," that he did not know what had happened, and that he had a very close relationship with his fiancée. App. A31-A47.[5] Mr. Brooks also showed his consciousness of guilt, stating that he must be "a suspect," and stating his belief that the police would not let him leave if he tried to walk out. App. A34-A35, A37-A38, A41. Throughout the interrogation, Mr. Brooks also attempted to divert the police with questions of his own, particularly when the police asked him about his statement to the 911 operator. App. A31-A47. Eventually, Mr. Brooks invoked his right to remain silent, but the fact of his invocation was not presented to the jury. *See* App. A47.

In light of these facts, Mr. Brooks's post-*Miranda* statements constituted the third or fourth false account offered by Mr. Brooks in the aftermath of the murder. As such, Mr. Brooks's "silence" about certain facts while he was offering statements about his role in the murder was highly probative of his guilt. Moreover, once Mr. Brooks took the stand and offered his newly-minted account of self-defense, his previous silence in that regard became even more probative. *See Brecht v. Abrahamson*, 507 U.S. at 628-29 ("It was entirely proper—and probative—for the State to impeach his testimony by pointing out that petitioner had failed to tell anyone before the

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[5] The Missouri Supreme Court included only a brief summary of Mr. Brooks's interview. "Brooks was questioned, but repeatedly avoided answering. Brooks made the statements, 'I don't have nothing to hide' and 'I didn't do nothing at all.' Brooks did not give an account of the struggle or shooting during the interview." App. A3-A4. The full interview presented to the jury is included in the Appendix. App. A31-A47.

time he received his *Miranda* warnings at his arraignment about the shooting being an accident.").[7]

In short, silence, itself, can be probative of guilt, and it can be relevant to the defendant's credibility. Here, the "silence" that the State commented on was the absence of critical information that a person naturally would have been expected to provide in the voluntary interrogation that followed the *Miranda* warnings. Accordingly, by including such "silence" in the realm of protected silence contemplated by *Doyle*, the Missouri Supreme Court has expanded *Doyle* to preclude the use of "silence" that has legitimate probative value.[8]

III. The Missouri Supreme Court's decision is in conflict with decisions of the Federal Circuit Courts and decisions of state courts of last resort, and it sharpens a conflict over the scope of *Anderson v. Charles* in situations where the defendant's post-*Miranda* statements are less explicit than the statements at issue in *Anderson*.

There is a dearth of case law to support the Missouri Supreme Court's expansion of *Doyle* under

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[7] Although *Brecht* involved pre-*Miranda* silence, there is little reason to differentiate between the probative nature of pre-*Miranda* silence and omissions in a post-*Miranda* statement. In either instance, the defendant has not been induced to remain silent by the *Miranda* warnings.

[8] In *Wainright v. Greenfield*, the Court noted that some commentators have said that "*Doyle*'s probativeness rationale is secondary to its implied assurance rationale." 474 U.S. at 294 n. 12. The present case reveals the ongoing importance of the probativeness rationale in balancing the defendant's rights against the interests of the State.

the facts of this case. The Missouri Supreme Court did not cite to any comparable case, and petitioner knows of no case where the defendant's various evasions and critical omissions in a lengthy, post-*Miranda* interview were deemed to be protected "silence" under the rule in *Doyle*.

On the other hand, many cases have followed the Court's decision in *Anderson* and allowed the State to highlight omissions in a defendant's post-*Miranda* statements—both as affirmative evidence of the defendant's guilt and for purposes of impeachment. *See e.g. United States v. Ochoa-Sanchez*, 676 F.2d 1283, 1284-87 (9th Cir. 1982) (a prosecutor "may probe all post-arrest statements and the surrounding circumstances under which they were made, including defendant's failure to provide critical details"); *State v. Henry*, 863 P.2d 861, 871-72 (Ariz. 1993) (the defendant's failure to even mention a murder in his first post-*Miranda* statement was an omission that the state could use without violating *Doyle*); *People v. Osband*, 919 P.2d 640, 686-87 (Cal. 1996) (allowing use of the defendant's post-*Miranda* denials and failure to explain the presence of his fingerprints at the scene); *State v. Bell*, 931 A.2d 198, 207-12 (Conn. 2007) (prosecutor presented evidence of, and extensively impeached the defendant with, numerous omissions in his post-*Miranda* interrogation); *Wade v. Com.*, 724 S.W.2d 207, 208-09 (Ky. 1986) (where the defendant embellished his trial testimony with new helpful facts, it was proper for the State to impeach the defendant with the fact that he had been silent about those facts in his post-*Miranda* statement); *People v. McReavy*, 462 N.W.2d 1, 4-10 (Mich. 1990) (where the defendant answered some questions post-*Miranda* but was nonresponsive when asked about the robbery, it was proper for the state to present

evidence in its case-in-chief about the defendant's non-responsive conduct); *State v. Parker*, 585 N.W.2d 398, 402-04 (Minn. 1998) (post-*Miranda* statement "I don't know" was properly used against the defendant); *State v. Mitchell*, 346 S.E.2d 458, 460-62 (N.C. 1986) (where the defendant embellished his trial testimony with new facts, it was proper for the State to impeach the defendant with the fact that he had been silent about those facts in his post-*Miranda* statement).

In *State v. Bell*, 931 A.2d 198, the Supreme Court of Connecticut upheld the State's extensive use of omissions in it case-in-chief and in cross-examining the defendant. There, after *Miranda* warnings, the defendant talked at some length with police officers and told them that he had run from the scene of an assault. *Id.* at 205, 212. After he was interrogated, but before his trial in the state court, the defendant testified about the crimes in a federal prosecution. *Id.* at 207. In the federal case, the defendant embellished his account with numerous details that he had not previously provided to the police, including, for example, that his cousin was likely the shooter. *Id.* In the state-court trial, the State introduced a transcript from the federal case in its case in chief. *Id.* The transcript included repeated instances where the federal prosecutor asked the defendant about his failure, in the police interrogation, to mention several facts. *Id.* at 207-208, n. 14. Then, on cross-examination of the defendant, the state prosecutor repeatedly asked the defendant about the various omissions in his police interrogation. *Id.* at 208-209. In particular, much like the prosecutor in the present case, the prosecutor in *Bell* repeatedly forced the defendant to admit that he had not said "a word"

about the new facts he had testified to at his trials. *Id.* at 209, n. 16.

In *People v. McReavy*, 462 N.W.2d at 4-5—a case that was, in some respects, closely analogous to the present case—the defendant did not testify, and the State presented evidence that the defendant had been nonresponsive and silent when asked certain questions during his post-*Miranda* interrogation. One officer testified that the defendant appeared to be "dejected," and that the defendant said that "everything was going fine until 'this happened.' " *Id.* at 4. The officer also testified that the defendant "did not respond to direct questions regarding the robbery or deny his involvement, but simply put his head in his hands and looked down, [and] that he didn't respond yes or no to those questions." *Id.* The officer testified that the defendant said he was not denying that he committed the robbery, and that the defendant eventually said that he wanted time to think and "would clear up everything" about the robbery in the morning. *Id.* at 5. A second officer offered similar testimony. *Id.* In closing argument, the state summarized the officers' testimony and argued that, in the defendant's interrogation, there was "[n]ot one denial, not one suggestion that it wasn't me." *Id.* at 6. The prosecutor argued further that the defendant had made "passive admissions." *Id.* The defendant argued that the State's use of such evidence in its case-in-chief (and in closing argument) violated *Doyle*, but the Supreme Court of Michigan held that the defendant's silence was not "insolubly ambiguous" because the defendant had not invoked his right to remain silent. *Id.* at 7. And, citing *Anderson v. Charles*, the Michigan Court observed that in *Anderson* the Court "refused to endorse a formalistic view of silence" "[w]here the

defendant has not maintained 'silence,' but has chosen to speak[.]" *Id.* at 10.

In contrast to cases like *Bell* and *McPeavy*—where courts have permitted the state to use omissions and actual or selective silence that occurred during a post-*Miranda* interrogation—the Missouri Supreme Court has adopted a rule that will prohibit the use of a much broader range of "silence." This conflict in applying *Doyle* should be resolved.

In addition, in holding that Mr. Brooks's "silence" was the equivalent of actual silence under *Doyle*, the Missouri Supreme Court has sharpened a conflict over the application of the rule in *Anderson v. Charles*. In support of its holding, the Missouri Supreme Court cited primarily to footnote 2 in *Anderson*, where the Court drew a distinction between the generic post-*Miranda* exclamations of one of the defendants in *Doyle* and the more explicit post-*Miranda* statements of the defendant in *Anderson* App. A5.

But, as discussed above, the Court in *Anderson* did not consider whether critical omissions in a lengthy post-*Miranda* interrogation would constitute protected silence under *Doyle*. Thus, the Missouri Court's reliance on footnote 2 of *Anderson* is a questionable proposition. Nevertheless, there is an apparent division of thought that could have grown out of the Court's language in footnote 2; for, in distinguishing the statements, the Court pointed out in footnote 2 that the more generic exclamations of one of the defendants in *Doyle* did not "contradict[] the defendant's later trial testimony." 447 U.S. at 407 n. 2. Accordingly, courts have required different

degrees of inconsistency or contradiction between post-*Miranda* statements and later trial testimony.

For example, the Tenth Circuit, in *United States v. Canterbury*, 985 F.2d 483, 484-86 (10th Cir. 1993), concluded that there was no inconsistency between a defendant's post-*Miranda* statement that he bought an illegal silencer "for protection" and the defendant's subsequent testimony that he was "entrapped" by an individual working with the police. The court seemingly found no inconsistency because the defendant denied making the post-*Miranda* statement that he bought the silencer "for protection." *Id.* at 485. *See also United States v. Massey*, 687 F.2d 1348, 1353 (10th Cir. 1982) (ignoring an arguable inconsistency because the "evidence was not inconsistent as a whole with [the defendant's] exculpatory story, had the jury chosen to believe him").

Unlike the Tenth Circuit, other courts have held that an "arguable" or implicit inconsistency is sufficient. *See Grieco v. Hall*, 641 F.2d 1029, 1034 (1st Cir. 1981) (post-*Miranda* statement must be "arguably" inconsistent with later trial testimony); *Bass v. Nix*, 909 F.2d 297, 302-04 (8th Cir. 1990) (apparently agreeing that a post-*Miranda* statement can be used if it "explicitly or implicitly contradict[s] the defendant's later trial testimony, but requiring, at least, that the statement be "fairly construed to conflict" with later testimony); *United States v. Caruto*, 532 F.3d 822, 831 (9th Cir. 2008) ("the differences between the post-arrest statement and the trial testimony must be 'arguably inconsistent' "). Some courts have held that no inconsistency is required under some circumstances, or that differences between the statements due to factual embellishment are sufficient. *See United States v. Crowder*, 719 F.2d 166,

172 (6th Cir. 1983) (requiring an inconsistent statement "relies on a reading of *Anderson v. Charles* which is too restrictive"); *State v. Gillard*, 533 N.E.2d 272, 278-79 (Ohio 1988) (the state properly used the defendant's post-*Miranda* statements in its case-in-chief despite the fact that there was no inconsistency with the defendant's trial testimony); *State v. Bell*, 931 A.2d at 207-12 (omission in the post-*Miranda* interrogation were sufficient); *Wade v. Com.*, 724 S.W.2d at 208-09 (defendant's embellishment of his trial testimony was sufficient); *State v. Mitchell*, 346 S.E.2d at 460-62 (same). *See also Squire v. Com.*, 283 S.E.2d 201, 204-05 (Va. 1981) (if a defendant adds "crucial" exculpatory facts at trial, he can be impeached with the fact that he failed to mention them in a post-*Miranda* interview).

The Missouri Supreme Court has apparently adopted a stringent rule requiring that post-*Miranda* statements be expressly contradicted by subsequent trial testimony before such statements can be used by the State in any fashion. App. A5-A6. Such a rule substantially limits the application of *Anderson v. Charles*, and it will have the detrimental effect of precluding the admission of evidence that is both probative of guilt and relevant to impeach the credibility of a testifying defendant. Accordingly, the Court should clarify whether the language in footnote 2 of *Anderson* was intended to compel such a result, and the Court should provide concrete guidance on the standard that applies when post-*Miranda* statements are less direct than the statements at issue in *Anderson*.

IV. The Missouri Supreme Court's rule places an unwarranted and unfair burden on the state's legitimate interest of solving and prosecuting criminal offenses.

In concluding that the State violated *Doyle* by using Mr. Brooks's post-*Miranda* statements in its case-in-chief, the Missouri Supreme Court has placed a heavy burden on the State's use of an interview that was carried out according to the plain dictates of *Miranda*. By transforming Mr. Brooks's omissions during a lengthy statement into protected silence, the Missouri Court has effectively held that the interrogating officer violated *Miranda*, and has expressly held that he violated *Doyle* when he did not stop questioning Mr. Brooks at the moment Mr. Brooks gave evasive and incomplete answers. Indeed, in holding that the State's use of Mr. Brooks's recorded interview in its case-in-chief was improper, the Missouri Court expressly determined that several of the interrogating officer's *questions* were themselves *Doyle* violations. App. A11-A12 ("the questions posed by Detective Pruneau were additional comments about Brooks' post-*Miranda* silence").

But this is an unworkable rule. During a post-*Miranda* interrogation, if a suspect does not invoke the right to remain silent and instead gives evasive or incomplete answers, an officer should be allowed to continue to probe as long as the suspect is willing to answer more questions. An officer should not have to guess that a suspect is remaining "silent" by being evasive and terminate the interview for fear of violating *Miranda* and *Doyle*. Indeed, it is generally impossible for an investigating officer, early in a case, to know whether a suspect is purposely making

omissions and, thus, "partially" exercising his right to remain silent. Such a rule is unfair to officers who otherwise abide by *Miranda*, and it replaces a bright-line rule with an uncertain rule that has no clear boundaries.

In its *Miranda* cases, the Court has repeatedly recognized that one of *Miranda*'s virtues is its bright-line rules. *See Arizona v. Roberson*, 486 U.S. 675, 681 (1988). Those bright-line rules provide clear guidance to all parties, and they fairly balance the competing interests of those accused of crimes and those who work to uncover and prosecute crimes. The rule in *Doyle*, likewise, should be a bright-line rule—it ought to be confined to those cases where the defendant actually invokes the right to remain silent and then remains silent. This maintains a proper balance between protecting actual *Miranda*-induced silence and allowing the state to use a defendant's relevant post-*Miranda* statements.

As the Court stated in *Jenkins v. Anderson*, "[i]n determining whether a constitutional right has been burdened impermissibly, it also is appropriate to consider the legitimacy of the challenged governmental practice." 447 U.S. at 238. Here, the governmental practice was a custodial interrogation and the State's use of Mr. Brooks's post-*Miranda* statements at trial. These were legitimate practices. The interrogation was carried out according to the plain dictates of *Miranda*, and Mr. Brooks's post-*Miranda* statements themselves were not "silence." Accordingly, the statements should have been admissible in the State's case-in-chief as part of the string of false or incomplete accounts given by Mr. Brooks in the immediate aftermath of the murder. Moreover, any silence during the interrogation about certain facts

was not protected silence because it was not *Miranda*-induced silence. And, finally, once Mr. Brooks took the stand and offered a much more detailed account (along with his new claim of self-defense), his earlier, incomplete statements gained additional probative value. *See id.* ("impeachment [with silence] follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial").

In short, in addition to conflicting with the basic principles of *Doyle*, *Anderson*, and a host of cases from other jurisdictions, the rule adopted by the Missouri Supreme Court will unduly limit the State's ability to investigate and prosecute criminal offenses.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

CHRIS KOSTER
Attorney General

SHAUN J MACKELPRANG
Chief Counsel, Criminal Div.
Counsel of Record

P. O. Box 899
Jefferson City, MO 65102
shaun.mackelprang@ago.mo.gov
(573) 751-3321

Attorneys for Petitioner

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[State Seal]

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. SC90347
	)	
ROBERT R. BROOKS,	)	
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT
OF JEFFERSON COUNTY

The Honorable M. Edward Williams, Judge

I. Introduction

In August 2007, a jury found Robert Brooks guilty of one count of second degree murder and one count of armed criminal action. He was sentenced to life imprisonment and 75 years to be served concurrently.

On appeal, Brooks alleges the trial court erred in allowing comments and testimony about Brooks' failure to provide an exculpatory statement to police after being advised of his *Miranda* rights. This Court determines that the trial court erred in allowing comments on Brooks' post-*Miranda* silence in violation of *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49

L.Ed.2d 91 (1976). The judgment is reversed, and the case is remanded.

II. Facts

In August 2006, Brooks was engaged to, and living with, Amanda Cates. Brooks and Cates lived in Crystal City with Brooks' 14-year-old daughter. Brooks and Cates were both police officers--Brooks worked for the village of Calverton Park and Cates worked for the city of Normandy.

On the evening of August 28, 2006, Brooks attended a city council meeting. One of the agenda items was whether a female part-time officer would be hired as a full-time officer. Brooks had trained the officer. The council decided not to hire the officer. Brooks was upset about this and, after the meeting, confronted the chief of police.

Brooks and the officer then went to a bar, arriving at approximately 9:30 p.m. While at the bar, Brooks consumed seven or eight beers. Brooks also received multiple calls from Cates, who was unhappy he was not home.

At approximately 11:00 p.m., Brooks ordered three beers to go, and drove the part-time officer home. On the way, Brooks attempted to convince her to get a hotel room with him. The officer declined Brooks' invitation, and he dropped her off at about 11:30 p.m. As the officer was exiting, Brooks kissed her and attempted to pull her back into the vehicle. Also, around this time, Brooks called a woman named "Michelle."

Brooks then headed home. On the way home Brooks and Cates exchanged multiple telephone calls. Cates continued to be upset that Brooks was not home. Brooks arrived home at about 12:13 a.m. and, on the way, had finished the three beers.

At trial, Brooks testified that when he walked into the bedroom he "tossed" his gun on the bed and attempted to get ready for bed. Cates, however, was still upset and continued to argue with Brooks. During the argument, Cates took Brooks' keys, went to his truck, took his cell phone, found that he had called "Michelle," threw the phone into the grass and then went back inside. Brooks testified that Cates attacked him and threw things at him. Brooks also testified that when he tried to leave, Cates pointed his gun at him. Brooks and Cates struggled, and during the struggle, the gun discharged, killing Cates.

Brooks then called 911 and told the dispatcher he thought Cates was an intruder and accidentally shot her. After police arrived, Brooks was overheard talking on the telephone with his mother, telling her that they were sleeping and that Cates got up and continued the argument and then she was shot. Brooks was heard making similar statements to Officer Michael Tetrall.

At about 1:58 a.m., Brooks agreed to go to the Crystal City police station for an interview. Brooks was given the Miranda warning but refused to sign the department's Miranda form. Brooks was questioned, but repeatedly avoided answering. Brooks made the statements, "I don't have nothing to hide" and "I didn't do nothing at all." Brooks did not give an account of the struggle or shooting during the

interview. After the interview concluded, Brooks was arrested.

The jury found Brooks guilty of second degree murder and armed criminal action and recommended sentences of life imprisonment and 75 years. The trial court sentenced Brooks in accordance with the jury's recommendation and ordered the sentences to run concurrently.

III. At trial, the State commented and adduced testimony about Brooks' post-*Miranda* silence

Brooks alleges the trial court erred in allowing comments and testimony concerning Brooks' post-*Miranda* silence, which is prohibited under *Doyle*.

The Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." The privilege against self-incrimination is safeguarded by the mandatory procedures set out by the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). These procedures include the requirement that those in police custody be advised that they have the right to remain silent and that anything they may say can be used against them. *Id.* at 468-69, 86 S.Ct. 1602.

Breaching the implied assurances of the *Miranda* warning is an affront to the fundamental fairness required by the Due Process Clause. *Wainwright v. Greenfield*, 474 U.S. 284, 291, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986). In *Doyle*, based on that principle,

the United States Supreme Court held that a defendant's post-*Miranda* silence cannot be used to impeach a defendant. 426 U.S. at 619, 96 S.Ct. 2240. The holding in *Doyle* rests on the view that it is fundamentally unfair to implicitly assure a person his silence will not be used against him and then breach that promise by using that silence against him. *Wainwright*, 474 U.S. at 291, 106 S.Ct. 634.

Relying on *Doyle*'s notion of fundamental unfairness, Missouri's cases have held that post-*Miranda* silence cannot be used as evidence to incriminate a defendant. *See State v. Dexter*, 954 S.W.2d 332, 338 (Mo. banc 1997) (citing *State v. Zindel*, 918 S.W.2d 239 (Mo. banc 1996); *State v. Frazier*, 927 S.W.2d 378 (Mo.App.1996); *State v. Whitmore*, 948 S.W.2d 643 (Mo.App.1997); *State v. Martin*, 797 S.W.2d 758 (Mo.App.1990)). Moreover, post-*Miranda* silence cannot be used to impeach a defendant's testimony. *State v. Anderson*, 79 S.W.3d 420, 441 (Mo. banc 2002).

The State argues that Brooks waived all of his *Doyle* claims because he waived his silence when he told police that he had "nothing to hide" and "didn't do nothing at all." However, statements to police must be substantive to waive the right to silence. *Anderson v. Charles*, 447 U.S. 404, 408 n. 2, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980) (treating similar statements as not waiving the right to silence). A general denial of culpability, such as "I didn't do nothing at all," does not waive the right to remain silent. *State v. Crow*, 728 S.W.2d 229, 232 (Mo. App.1987) ("To waive his right to not have the State comment on the exercise of his right to silence, a defendant must make a statement obviously related

to something, and then the waiver is only as to the subject matter of that statement").

Applying the foregoing principles to the facts of this case, it is clear that Brooks' Fifth Amendment right was violated and that he did not waive his *Doyle* claims. The multiple errors alleged by Brooks are as follows:

A. Preserved Errors

The first *Doyle* violation occurred during opening statements when the State told the jury that, at the station, after Brooks received the *Miranda* warning, he failed to explain what happened:

> So Mr. Brooks goes to the station, he is not under arrest, not handcuffed, he goes down to the station and Lieutenant Thomas meets him down there, and they take him into the interview room and there is a camera being digitally recorded both on the video and also sound, and, you know, the defendant knows that. They also tell him to make sure he knows so there is no secrets there, even though he wasn't under arrest ... they went ahead and read him his Miranda warnings ... And basically all they did was ask him what happened, what happened, Bob. He never would tell them. Not a word. I need to talk to somebody is what he said, or I need a phone book. They gave him a phone book. Then he needs a phone number. They gave him a phone number. Then they say we want your side of the story, you are not under arrest, you are free to go, open the door and you are free to walk out of here. Over and over and over.

> You will see them ask him and he just tells--they didn't interrogate him like they do most people, they said just tell us what happened. Not a word. Never told them that he thought she was an intruder and accidentally shot her. He never told them anything. That's going to last close to an hour or so. And then finally, you know, finally he says I am done. At that point he is pretty well a suspect at that point, so they place him under arrest. And I will have to cut it off at that point because he invokes his rights, so at that point I got to turn it off.

Brooks' objection was sustained, but his motion for a mistrial was overruled. The trial court instructed the jury to disregard the prosecuting attorney's comments regarding Brooks' exercise of his right to remain silent.

The second *Doyle* violation occurred when Lieutenant Terry Thomas testified that, during the interview at the police station, Brooks failed to explain his conduct:

> [Prosecuting Attorney]: ... [C]ould you just read the warnings that you gave him, please?
>
> [Lieutenant Thomas]: Before we ask you any questions you must understand your rights. You have the right to remain silent. Anything you say can be used against you in Court. You have the right to talk to a lawyer for advice before we ask any questions and have him with you during questioning. If you cannot afford a lawyer, one will be appointed for you before any questioning, if you wish.

[Prosecuting Attorney]: All right. Now, did you handle this attempted interview a little different than you would say for just the common criminal on the street?

[Lieutenant Thomas]: Yes.

[Prosecuting Attorney]: All right. And how did you do it differently?

[Lieutenant Thomas]: We basically, I knew Mr. Brooks, and I say all we want is just a statement of what happened, we want to clarify everything, we want to give you the benefit of the doubt what exactly occurred.

[Prosecuting Attorney]: Did he, during the interview time period, ever tell you what happened?

[Lieutenant Thomas]: No, he did not.

[Prosecuting Attorney]: Did he ever give you an answer?

[Lieutenant Thomas]: No.

[Prosecuting Attorney]: Well besides yourself, who else was there for the interview[?] You and the defendant?

[Lieutenant Thomas]: Detective Mike Pruneau from the Crystal City Police Department.

[Prosecuting Attorney]: Do you know of any law enforcement officers who ever, while being questioned or not being questioned, he ever told what happened?

[Lieutenant Thomas]: No.

[Defense Counsel]: Your Honor, could we approach, please?

(At the bench)

[Defense Counsel]: Judge, I feel like we are revisiting this, but that question: "Do you know any officers that he ever told", that doesn't say prior to arrest. That could mean any time. And he did at some time assert his right, he, as Mr. Jerrell said in his opening statement, "he invoked his right, he called an attorney". This is now the third time, where there has been some comment, I believe this is directed as to whether or not he maintained his position on silence. Now, I let it go the first time, because according to Officer Thomas, at that time he wasn't under arrest. He had been Mirandized out of an abundance of caution, which is okay. And I believe that's he is only under--when he is no longer free to go. At this point he was still free to go. And I would like to be accurate, but I believe what was said, and I believe the court reporter would have it, was: "Are you aware of whether or not he made any statement at any point to any of the other officers".

[The Court]: That's what was said.

[Prosecuting Attorney]: Your Honor--

[Defense Counsel]: And that is a direct comment, because this jury can be led to believe that that happened even after he was placed under arrest, and there is no way to repair it now.

[Prosecuting Attorney]: I can certainly--I meant before, so I can certainly re-ask the question.

[The Court]: Well, I mean the objection will be sustained. I am going to instruct the jury--I

> am going to sustain the objection and instruct you to rephrase the question
>
> [Prosecuting Attorney]: Sure. Certainly.
>
> [Defense Counsel]: ... And I would ask for a mistrial.
>
> [The Court]: And the mistrial will be denied.
>
> ...
>
> [The Court]: ... I will sustain objection and instruct the prosecutor to re--rephrase the question.
>
> ...
>
> [The Court]: The objection is sustained. The question is ordered stricken from the record. [Prosecuting attorney], you are instructed to rephrase the question.

Brooks' objection was sustained, and his motion for a mistrial was overruled. The trial court instructed the prosecuting attorney to rephrase the question but erroneously did not instruct the jury to disregard the comment based on Brooks' right to remain silent.

B. Unpreserved Errors

Additionally, Brooks has identified *Doyle* violations that were not objected to at trial and, therefore, may be considered unpreserved for purposes of appeal or subject to plain error review.[1] During the

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[1] Brooks also contends the State adduced testimony from Officers Wynn, Guidicy and McCreary about his post-*Miranda* silence. The officers' testimony did not refer to any post-*Miranda* period of time. Rather, a review of the transcript shows that the prosecutor was asking the officers about events and statements made by Brooks at the scene of the crime, before any *Miranda* warnings were given. Due process is not violated by the use of a defendant's pre-*Miranda* silence for

State's opening argument, immediately after the trial court instructed the jury to ignore the State's comment about Brooks' post-*Miranda* silence, the State made another comment about Brooks' silence, "The evidence will show that for a good part of an hour, after repeatedly asking what happened, and he would not tell them."

The next comment about Brooks' post-*Miranda* silence came when a recording of the police interview was played for the jury. The recording contained multiple exchanges where Detective Pruneau told Brooks that he needed an explanation of what happened. The jury was already aware that Brooks never gave an explanation, and these questions were further comments about Brooks' post-*Miranda* silence. The recording contained the following comments:

> [Detective Pruneau]: Robert, I don't know what happened. All I want to do is find out what happened. And you know as well I do that when officers are first on the scene, they are coming in, they are getting their statements, you are giving a statement, we weren't there, you are upset, things were going on, so you have been doing this for years.
>
> ...
>
> [Detective Pruneau]: ... you know good and well that you can tell us what happened.
>
> ...
>
> [Detective Pruneau]: ... here's the thing, Bob, and I keep saying this, I need, because I am--I am one of the investigators here, okay? And you know this. You have been there. You have

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impeachment purposes. *Jenkins v. Anderson*, 447 U.S. 231, 238-39, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980).

> don[e] it. You know how it goes. And you know--you know, whenever we talk to somebody and we hey listen, what is your side. And when we don't get cooperation--
>
> ...
>
> [Detective Pruneau]: ... it's going to be hard for me to defend you, being a police officer and saying hey, you know what he didn't cooperate, and he didn't tell me this. You know that. So I need to hear from you what happened.

The tape of the interview was stopped shortly thereafter and without Brooks ever explaining what happened. As a result, the questions posed by Detective Pruneau were additional comments about Brooks' post-*Miranda* silence.[2]

Brooks testified at trial. During cross-examination, the State commented about his post-*Miranda* silence, confirming that Brooks had, in fact, failed to give officers an account of what happened:

> [Prosecuting Attorney]: ... you were here when the tape of that--or the CD of that interview was played to the jury, correct?

---

[2] The State suggests any error resulting from the recording was waived because defense counsel stated "no objection" when the recording was offered into evidence. Rule 30.20 states, "Whether briefed or not, plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." This Court always has the discretion to engage in plain error review of issues concerning substantial rights, especially constitutional rights such as the one at issue here. In this case, these unpreserved errors are considered in addition to the preserved errors for purposes of determining whether the State has met its burden to show that these constitutional violations were harmless beyond a reasonable doubt.

[Robert Brooks]: Yes, sir.

[Prosecuting Attorney]: All right. And neither Terry Thomas or Detective Mike Pruneau, basically what they asked you was, we just want to know what happened, give us your side of the story. Is that a fair rendition of what they were asking you?

[Robert Brooks]: I believe so.

[Prosecuting Attorney]: All right. And you never told them, did you?

[Robert Brooks]: Didn't say anything.

The State commented about Brooks' post-*Miranda* silence during closing arguments:

The only received defense evidence you have got is what he says happened, and quite frankly, no matter how embarrassed a person is, if it had really happened like he said, he would have been screaming it to the walls. He wouldn't have started out for the intruder lie. He wouldn't have kept the lie going. He would have changed it when asked.

IV. *Doyle* analysis

Once a *Doyle* violation has been found, this Court has discretion to review the violation or violations in the context of the entire record. *Dexter*, 954 S.W.2d at 340. The proper standard for review, when the error is preserved, is the harmless-beyond-a-reasonable-doubt standard. *Id.* at 340 n. 1. Under this standard, the State bears the burden of proving that a federal constitutional error was harmless beyond a reasonable doubt. *Id.* Harmless beyond a reasonable

doubt means that no reasonable doubt exists that the admitted evidence failed to contribute to the jury's verdict. *State v. March*, 216 S.W.3d 663, 667 (Mo. banc 2007).

To determine the effect of a *Doyle* violation on the jury's verdict, this Court examines these factors: (1) whether the government made repeated *Doyle* violations; (2) whether the trial court made any curative effort; (3) whether the defendant's exculpatory evidence is transparently frivolous; and (4) whether the other evidence of the defendant's guilt is otherwise overwhelming. *Dexter*, 954 S.W.2d at 340 n. 1.

A. The State made repeated *Doyle* violations

There can be no doubt the State made repeated *Doyle* violations. Like *Dexter*, the State, whether purposefully or not, developed a theme that carried throughout all phases of trial. *Id.* at 340-41. As noted above, the theme was that if Brooks was innocent, he would have made an exculpatory statement during the police interview. This theme was repeated through all stages of trial.

B. The trial court's curative efforts had little effect

The trial court undertook some action to cure the effect of each of the preserved errors. As noted, the State commented about Brooks' silence during opening arguments. The trial court told the jury to disregard the State's comment:

> Ladies and gentlemen, the objection of defense counsel has been sustained. The jury

> will be instructed to disregard the prosecuting attorney's comments regarding the defendant's exercise of his right to remain silent. Those comments will be stricken from the record and should play no part in your consideration of this case.

When Lieutenant Thomas commented about Brooks' right to remain silent, the trial court ordered the State to rephrase the question but erroneously did not instruct the jury to disregard the comment about Brooks' right to remain silent.

In *Dexter*, similar curative efforts were made to the jury. *Id.* at 341. This Court found those efforts to be minimal and determined that because the issue had been raised to the jury, it "created an inference of guilt by directing the jury to be suspicious of appellant's lack of response...." *Id.* The same is true concerning the facts of this case; the curative efforts here were minimal. Although the court instructed the jury to disregard the comment in the State's opening statement, it failed to give a similar instruction in response to Lieutenant Thomas' testimony. The court's efforts had little effect as the trial progressed because the jury had already entertained the State's suggestion that if Brooks was innocent he would have explained his struggle with Cates and his self-defense theory. Moreover, notwithstanding the trial court's rulings, the State continued to call attention to Brooks' post-*Miranda* silence.

C. Brooks' exculpatory evidence is not transparently frivolous

Brooks' defense that he was struggling with Cates when the gun discharged was not transparently

frivolous; in fact, the trial court gave the offered self-defense instruction, which is an implicit finding that the trial court believed there was substantial evidence to support the instruction. The defense was plausible and supported by Dr. Case's testimony that Cates was shot during a struggle over the gun. Brooks also testified about a prior occasion in which Cates had pointed a gun at him during an argument.

D. Evidence of Brooks' guilt is not otherwise overwhelming

Evidence of Brooks' guilt is substantial but not overwhelming. In *Dexter*, this Court acknowledged the difficulty in determining what establishes "overwhelming evidence" but concluded that it means, "at a minimum that there is sufficient evidence to support a conviction without consideration of the inadmissible evidence ... [t]here must be no reasonable doubt that appellant committed the crime, and the degree of prejudice that occurred by use of the inadmissible references to appellant's post-Miranda warnings silence must be insubstantial." *Id.* at 342.

The State's use of Brooks' silence was not insubstantial. A review of the record suggests some of the more persuasive evidence of Brooks' guilt were the inconsistent pre-*Miranda* statements he made, but the State for the most part chose not to cross-examine him concerning those statements. In lieu of that permissible strategy, the State chose the impermissible strategy of using of Brooks' post-*Miranda* silence. The success of Brooks' self-defense instruction depended on his credibility, and the State's impermissible use of his post-*Miranda* silence undermined his credibility. Therefore, in light of the result

in this case, it cannot be said that the cumulative effect of the multiple references to his post-*Miranda* silence were insubstantial.

V. Conclusion

This Court determines that the State's repeated, improper references to Brooks' post-*Miranda* silence violated his constitutional rights as explained in *Doyle*. The State failed to meet its burden to show that the constitutional violations were harmless beyond a reasonable doubt. Because of: (1) the repeated *Doyle* violations; (2) the de minimus curative efforts; (3) the plausibility of Brooks' defense; and (4) the fact that the evidence of Brooks' guilt was not otherwise overwhelming, the judgment is reversed, and the cause is remanded.

Zel M. Fischer, Judge

All concur.

[State Seal]

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION TWO

STATE OF MISSOURI,	)	No. ED90918
	)	
Respondent,	)	Appeal from the
	)	Circuit Court
	)	of Jefferson County
vs.	)	
	)	Honorable M.
	)	Edward Williams
ROBERT P. BROOKS,	)	
	)	
Appellant.	)	Filed: March 3, 2009

Before Roy L. Richter, P.J., Lawrence E. Mooney, J., and George W. Draper III, J.

ORDER

PER CURIAM

Robert Brooks appeals the judgment entered on a jury verdict finding him guilty of second-degree murder, Section 565.021 RSMO 2000, and armed criminal action, Section 571.015 RSMO 2000. An opinion would have no precedential value. We have furnished the parties with a memorandum, for their information only, setting forth the reasons for our decision. We affirm. Rule 30.25(b).

[State Seal]

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION TWO

STATE OF MISSOURI,	)	No. ED90918
	)	
Respondent,	)	Appeal from the
	)	Circuit Court
	)	of Jefferson County
vs.	)	
	)	Honorable M.
	)	Edward Williams
ROBERT P. BROOKS,	)	
	)	
Appellant.	)	Filed: March 3, 2009

Before Roy L. Richter, P.J., Lawrence E. Mooney, J., and George W. Draper III, J.

MEMORANDUM SUPPLEMENTING ORDER AFFIRMING JUDGMENT PURSUANT TO RULE 30.25(b)

This memorandum is for the information of the parties and sets forth the reasons for our order affirming the judgment.

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR OR TRANS-

FER TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION.

The defendant, Robert Brooks appeals the judgment entered on a jury verdict finding him guilty of second-degree murder, Section 565.021 RSMo 2000, and armed criminal action, Section 571.015 RSMo 2000. The defendant advances one point on appeal, in which he contends his constitutional rights were violated when the prosecutor impermissibly commented on his post-*Miranda* silence. Specifically, he alleges the trial court erred in allowing the State to comment on and adduce testimony regarding his failure to provide an exculpatory statement to the police after being advised of his *Miranda* rights, and in not declaring a mistrial on that account, because the State's references to his post-*Miranda* silence violated his right to due process and his right to remain silent and not have his silence used against him.

By order, this Court affirms the trial court's judgment. For the benefit of the parties, we now provide this memorandum explaining the reasons for our decision. We presume the parties' familiarity with the facts of the case; thus, we do not recite them here, but rather proceed directly to our discussion of the defendant's allegation of trial-court error and our reasons for affirming the trial court's judgment.

Discussion

The Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, commands that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const., amend. V;

Estelle v. Smith, 451 U.S. 454, 462 (1981); *State v. Mahan*, 971 S.W.2d 307, 314 (Mo. banc 1998). The privilege against self-incrimination is safeguarded after arrest by the mandatory warning procedures outlined by the United States Supreme Court in its landmark *Miranda* decision. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mahan*, 971 S.W.2d at 314. These procedures include the requirements that police advise those taken into custody that they have the right to remain silent, and warn them that anything they may say can be used against them. *Miranda*, 384 U.S. at 468-9; *Mahan*, 971 S.W.2d at 314. Breaching the implied assurances of the *Miranda* warnings is an affront to the fundamental fairness that the Due Process Clause requires. *Wainwright v. Greenfield*, 474 U.S. 284, 291 (1986). Indeed, the United States Supreme Court has specifically held that the use for impeachment purposes of a defendant's silence, at the time of arrest and after receiving *Miranda* warnings, violates the due process clause of the Fourteenth Amendment. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976); *State v. Dexter*, 954 S.W.2d 332, 337 (Mo. banc 1997). This *Doyle* holding rests upon the view that is fundamentally unfair to implicity assure an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. *Wainwright*, 474 U.S. at 291 (quoting *South Dakota v. Neville*, 459 U.S. 553, 565 (1983)); *Dexter*, 954 S.W.2d at 337.

Correspondingly, the law in Missouri is clear that a defendant's post-*Miranda* silence is not admissible against him. *State v. Stuart*, 456 S.W.2d 19, 22 (Mo. banc 1970); *Dexter*, 954 S.W.2d 332; *State v. Flynn*, 875 S.W.2d 931 (Mo.App. S.D. 1994); *State v. Mabie*, 770 S.W.2d 331 (Mo.App. W.D. 1989); *State v. Roth*,

549 S.W.2d 652 (Mo.App. 1977); *State v. Benefield*, 522 S.W.2d 830 (Mo.App. 1975). The right of an accused "to be free from compulsory self-incrimination embraces not only the prerogative to remain silent but also that such silence shall not be allowed to prove guilt." *Roth*, 549 S.W.2d at 654 (citing *State v. Elmore*, 467 S.W.2d 915, 917 (Mo. 1971)). The State may not use a defendant's post-arrest silence either as affirmative proof of the defendant's guilt or to impeach his testimony. *Flynn*, 875 S.W.2d at 934; *see also State v. Anderson*, 79 S.W.3d 420, 441 (Mo. banc 2002). The State may not introduce evidence or comment in argument regarding a defendant's failure to volunteer an exculpatory statement following his arrest. *Stuart*, 456 S.W.2d at 22; *Flynn*, 875 S.W.2d 931; *Roth*, 549 S.W.2d 652; *Benefield*, 522 S.W.2d 830; *State v. Howell*, 838 S.W.2d 158, 161 (Mo.App. S.D. 1992).

The defendant contends the State violated these basic tenets of law. He maintains the prosecutor repeatedly commented on, and adduced testimony regarding his failure to provide an exculpatory statement to the police. The defendant alleges these improper comments and testimony occurred in opening statement, during the testimony of various witnesses, and in closing argument.

When presented with an alleged *Doyle* violation, whether the alleged error was preserved or not, we must first determine whether any of the specific complained-of references actually crossed the *Doyle* line and therefore were erroneous. *Dexter*, 954 S.W.2d at 338-40; *State v. Cornelious*, 258 S.W.3d 461, 465 (Mo.App. W.D. 2008). In doing so here, we find no impropriety. The defendant asserts correctly that he had the right to remain silent and, as detail-

ed above, that it is not permissible for the State to use post-*Miranda* silence as either substantive evidence of guilt or for impeachment. This general rule has no application, however, where the accused does not exercise his right to remain silent, but instead elects to make a statement. *State v. Smart*, 756 S.W.2d 578, 580 (Mo.App. W.D. 1988); *State v. Frentzel*, 717 S.W.2d 862, 866 (Mo.App. S.D. 1986); *State v. Harper*, 637 S.W.2d 342, 345 (Mo.App. W.D. 1982); *State v. Van Doren*, 657 S.W.2d 708, 716 (Mo.App. 1983); *State v. Lindsay*, 709 S.W.2d 499, 509 (Mo.App. W.D. 1986); *State v. Trice*, 575 S.W.2d 739, 742 (Mo.App. 1978); *Wilson v. State*, 50 S.W.3d 885, 889 (Mo.App. S.D. 2001). "The theory of the rule against evidence of post-arrest silence [with the concomitant inference of a failure to volunteer an exculpatory statement] is that it penalizes a defendant for the exercise of the right to remain silent. That rationale, however, has no application where ... the defendant, after advisement of rights (makes) a statement to the police of the criminal event." *Lindsay*, 709 S.W.2d at 509. If a defendant answers questions or makes a statement while in custody, the right to remain silent and not have the State comment on that silence is waived as to the subject matter of those statements. *Anderson v. Charles*, 477 U.S. 404, 408 (1980); *see also Smart*, 756 S.W.2d at 581; *Frentzel*, 717 S.W.2d at 866; *Trice*, 575 S.W.2d at 742.

To waive his right to not have the State comment on the exercise of his right to silence, however, a defendant must make a statement "obviously related to something." *State v. Crow*, 728 S.W.2d 229, 232 (Mo.App. E.D. 1987)(finding no waiver of defendant's right to remain silent, and thus reversible error in allowing the prosecutor to comment on the lack of

pretrial exculpatory statements, where the defendant's post-arrest responses to the officer's questions made no reference to the alleged criminal act); *accord State v. Weicht*, 835 S.W.2d 485, 488 (Mo.App. S.D. 1992). Where he does, however, "[a] defendant who voluntarily speaks after receiving *Miranda* warnings may be impeached not only with his statements but also with his 'selective silence.'" *State v. Hutchison*, 957 S.W.2d 757, 763 (Mo. banc 1997); *State v. Antwine*, 743 S.W.2d 51, 70 (Mo. banc 1987); *Smart*, 756 S.W.2d at 581; *Frentzel*, 717 S.W.2d at 866; *Trice*, 575 S.W.2d at 742; *State v. Pulis*, 822 S.W.2d 541, 546 (Mo.App. S.D. 1992). Once the right to remain silent has been waived, all speech, or non-silence, by a defendant may be admitted into evidence, and his failure to answer certain inquiries is a "fair subject for comment at trial." *State v. Tims*, 865 S.W.2d 881, 885 (Mo.App. E.D. 1993); *Smart*, 756 S.W.2d at 581; *Frentzel*, 717 S.W.2d at 866; *Trice*, 575 S.W.2d at 742.

In this case, the defendant was informed of his constitutional rights, including his right to remain silent. He acknowledged that he understood his right to remain silent. The defendant then voluntarily elected to respond to questions asked by the interviewing office. By answering the officer's questions, the defendant elected not to remain silent. During the course of the interview, when being questioned about the events of the day and his version of what occurred, the defendant stated, "I don't have nothing to hide. I didn't do nothing at all." We hold that the defendant waived his right to remain silent. The defendant's statement clearly refers to the alleged criminal offense. Accordingly, once the defendant waived his right to remain silent, his silence, and his failure to provide the exculpatory details he later

provided at trial, was a fair subject for comment by the prosecutor. The trial court did not err either in allowing the State to comment on and adduce testimony regarding the defendant's failure to provide an exculpatory statement to the police, or in failing to declare a mistrial on these grounds. We deny the defendant's point, and affirm the judgment of the trial court.[1]

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[1] We have reached an overarching conclusion that the State committed no *Doyle* violation. If we were to parse the defendant's point relied on into individual claims of error, we would still deny relief. The Missouri Supreme Court, in its *Dexter* decision, has instructed that the analysis for a *Doyle* violation is the same regardless of whether or not the issue was properly preserved for appeal. *State v. Dexter*, 954 S.W.2d 332, 340 n.1 (Mo. banc 1997). *State v. Jones*, 7 S.W.3d 413, 418 (Mo.App. E.D. 1999) (noting that "the factors used in an analysis of a preserved error violation pursuant to the harmless-beyond-a-reasonable-doubt standard are the same as those used to determine whether a non-preserved violation is plain error resulting in manifest injustice.) Here, the defendant's allegation of trial-court error is not preserved for our review. For this Court to review an issue on appeal, the issue must be properly preserved. *State v. Chambers*, 234 S.W.2d 501, 513 (Mo.App. E.D. 2007). "The general rule with respect to preservation of error is that an objection stating the grounds must be made at trial, the same objection must be set out in the motion for new trial and must be carried forward in the appellate brief to preserve it." *Id.* (Internal citation omitted). The defendant challenges a number of allegedly improper comments and testimony. A close review reveals that the vast majority of these instances occurred either without objection or after an affirmative waiver by the defense. Defense counsel did object to one comment in opening argument (transcript pages 162-3) and to two questions during the testimony of Lt. Thomas (transcript pages 536-7 and 539-40). The trial court sustained the objection and took curative steps, such as striking the comments from the record and instructing the jury to disregard the statements and testimony. Generally, such circumstances preclude our review. Yet, we note out Supreme Court in *Dexter* considered such

occurrences in their *Doyle* analysis, regardless of the sustained objections. *Dexter*, 954 S.W.2d at 339.

The complained-of questions and testimony from the three police officers – Wynn, Guidicy, and McCreary – on the other hand, play no part in our analysis. Similarly, one instance of challenged testimony from Lt. Thomas (transcript pages 570-1) has no bearing on our decision. The officers' testimony did not refer to any post-*Miranda* period of time. Rather, a review of the transcript shows that the prosecutor was asking the officers about events and statements made by the defendant at the scene of the crime, before any *Miranda* warnings were given. Due process is not violated by the use of a defendant's pre-*Miranda* silence for impeachment purposes. *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980); *Fletcher v. Weir*, 455 U.S. 603, 604 n.1 (1982); *State v. Antwine*, 743 S.W.2d 51, 69 (Mo. banc 1987); *State v. Wallace*, 952 S.W.2d 395, 396 (Mo.App. W.D. 1997). "When a defendant offers an explanation for his actions at trial and circumstances suggest that he would naturally have given the explanation earlier if the explanation were true, his previous silence may be used to impeach him if the silence was not the result of an exercise of his Fifth Amendment rights." *State v. Cornelious*, 258 S.W.3d 461, 466 (Mo.App. W.D. 2008). Where, as here, a defendant claims self-defense, there is generally an expectancy that he would have given the explanation prior to trial if the explanation were true. *Id.* (citing *Antwine*, 743 S.W.2d at 69, and *State v. Cummings*, 779 S.W.2d 10, 12 (Mo.App. 1989)). Accordingly, there is no constitutional impropriety in the prosecutor's use of the defendant's pre-*Miranda* silence for impeachment purposes.

Even if we were to consider this challenged testimony, no objection to the testimony was lodged by defense counsel, just as no objection was lodged to the second complained-of statement from opening statement (transcript page 168), the questions from defendant's cross-examination, and the statements made by the prosecutor during close argument. Defendant counsel may have realized there was no *Doyle* violation. Or, it might have been the trial strategy of defense counsel to not object to these various occurrences, in an attempt to lessen the impact of such evidence. In any event, a specific objection to evidence at the time the evidence is offered is required to preserve the issue for appellate review. *State v. Smith*, 185 S.W.3d 747, 756 (Mo. App. S.D. 2006). By not objecting, the defendant has not pre-

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served his claim for appellate review. As such, we can only review for plain error. Rule 30.20; *State v. McLaughlin*, 265 S.W.3d 257, 262 (Mo. banc 2008); *Cornelious*, 258 S.W.3d at 465; *see also e.g., State v. Thomas*, 272 S.W.3d 421, 427 (Mo. App. E.D. 2008). A defendant's post-*Miranda* silence is reviewable as a matter of plain error. *Dexter*, 954 S.W.2d at 340; *State v. Sindel*, 918 S.W.3d 239, 241-244 (Mo. banc 1996). Under plain-error review, we will grant relief only if a plain error affecting substantial rights resulted in a manifest injustice or a miscarriage of justice. *McLaughlin*, 265 S.W.3d at 262; *Jones*, 7 S.W.3d at 418. It is axiomatic, however, that in order to receive plain-error relief, the defendant must demonstrate that a plain error affecting substantial rights, indeed, occurred. The defendant fails to do so in this case.

Lastly, the defendant complains about the playing of a portion of the video recording of his interview at the police station. Any objection to the playing of the tape was affirmatively waived, however. The records shows that when the State offered the recorded interview into evidence, immediately before playing it for the jury, defense counsel stated he had "No objection" to its admission. "Generally, an announcement of 'no objection' amounts to an affirmative waiver of appellate review of the issue." *State v. Collins*, 188 S.W.3d 69, 77 (Mo.App. E.D. 2006). Under such circumstances, even plain-error review is not warranted. *Id.*

[Trial transcript, pp. 407-411, beginning with line 2:]

Q. And did I request you to make a copy of the original CD because it wouldn't play in the system that we have here in the Court?

A. YES.

Q. And is this an exact duplicate of the original 9-1-1 CD this was made for this case?

A. That's correct.

Q. And you listened to it and it's accurate?

A. Yes.

Q. All right.

MR. JERRELL [the prosecutor]: Your Honor, I am going to offer 48, and move to play it for the jury.

MR. KESSLER [defense counsel]: No objection.

THE COURT: Received. And you may play it.

(9-1-1 tape played for the jury).

(This transcript was made from the tape played in court to the jury.)

DISPATCHER: Emergency. 9-1-1.

ROBERT BROOKS: I need–oh fuck, emergency. 9-1-1. Oh, fuck, 9-1-1. I need paramedics and police.

DISPATCHER: What happened?

ROBERT BROOKS: Oh fucking–I thought my fiancée was an intruder and I shot her.

DISPATCHER: Okay. Where are you at?

[ROBERT BROOKS:] 43 Harbor Pointe. 43 Harbor Pointe. Yeah, please police. Please.

DISPATCHER: What did you shoot her with, sir?

ROBERT BROOKS: A .45. Hurry up.

DISPATCHER: State stay the line, okay. I am going to transfer you to ambulance.

ROBERT BROOKS: Please.

DISPATCHER: And police.

UNIDENTIFIED VOICE: Police.

ROBERT BROOKS: Oh, my God. Oh. I need an ambulance and police. I need an ambulance.

DISPATCHER: Where at?

ROBERT BROOKS: 43 Harbor Pointe.

DISPATCHER: What is the problem?

ROBERT BROOKS: My fiancée, she had been–I need an ambulance, please. She–I thought she was–fucking I woke up, and I thought she was an intruder and–please help me.

DISPATCHER: What happened? What happened?

ROBERT BROOKS: I shot her.

DISPATCHER: Where is she shot at?

ROBERT BROOKS: In the head. Please.

DISPATCHER: Okay. We will get somebody over there.

ROBERT BROOKS: Please. Help me, please.

DISPATCHER: I got–I got the ambulance on the way.

ROBERT BROOKS; Please. Please. Please.

DISPATCHER: Is she talking to you at all or anything?

ROBERT BROOKS: No, she is not. Please, help me. Please. Please. Please. I need help.

DISPATCHER: Okay. I got the ambulance on the way.

ROBERT BROOKS: I need help. Please.

UNIDENTIFIED FEMALE VOICE: Sir. Sir, what is your name?

ROBERT BROOKS: I am Brooks. I am Bob Brooks.

DISPATCHER: What is your name?

ROBERT BROOKS: I need help, please.

DISPATCHER: Sir, what is your name?

ROBERT BROOKS: I am Bob Brooks. I'm Bob Brooks.

DISPATCHER: Brooks.

ROBERT BROOKS: Yeah.

DISPATCHER: What is your last name?

ROBERT BROOKS: Brooks. Brooks. B-R-O-O-K-S.

DISPATCHER: What is her name?

ROBERT BROOKS: Amanda Cates.

DISPATCHER: Amanda?

ROBERT BROOKS: Yeah, she turned the fucking light on, and I didn't know who it was. I fell asleep. Goddamn it. Don't go in there. Go to bed, Chelsea. It's–Amanda. Amanda, please wake up. I need the paramedics. Amanda, talk to me. Amanda.

DISPATCHER: Sir, is she breathing?

ROBERT BROOKS: No. She's trying, just come on.

DISPTACHER: I am sorry.

ROBERT BROOKS: She is trying. Would you get the paramedics here?

DISPATCAHER: Sir, I have them on the way, okay?

ROBERT BROOKS: Oh, my gosh.

DISPATCHER: Sir, calm down. I have them on the way.

ROBERT BROOKS: I need them. Hurry. Please.

DISPATCHER: I know they are on the way. Officers are also on the way.

ROBERT BROOKS: Who?

DISPATCHER: Police officers.

ROBERT BROOKS: Chelsea get over here so I can get the light here–oh, oh, God. I know she is breathing still. I am trying. Chels, I am pumping on it.

DISPATCHER: Are you doing CPR?

ROBERT BROOKS: Yes. Pressure. Please. I didn't know who she was. I told her, don't wake me up. Chelsea. Amanda, talk to me, baby. Oh, God. It's right in the face. Will somebody help me please?

DISPATCHER: Sir. Sir, they are on their way, okay?

ROBERT BROOKS: Somebody help me, please. Will somebody help me? Chelsea, I need you to go, please. I got -Chels. Chelsea. Are you with me? Open the door, Chels. Come on. Come on. God damn it. God damn it. Goddamn it.

[Trial Transcript, pp. 548-569, beginning with line 2:]

Q. (By Mr. Jerrell [the prosecutor]) At some point Mr. Brooks – Mr. Brooks was placed under arrest; is that correct?

A. Correct.

Q. Prior to any arrest, did he ever tell you what happened?

A. No.

Q. All right. Let me show you what has been marked State's Exhibit Number 64. When you were in the interview room with the defendant on August 29th, 2006 was it being both filmed and audio recorded?

A. Yes, it was.

Q. And do you know what State's Exhibit 64 is?

A. That is a CD of the interview, part one.

Q. All right. I –

MR. JERRELL: Your Honor I am going to offer Exhibit 64 and play some of the CD.

MR. KESSLER [defense counsel]: No objection.

THE COURT: Received.

THE COURT: I believe Mr. Jerrell that you indicated that this is about twenty minutes; is that correct?

MR. JERRELL: Twenty-one.

THE COURT: I don't – about is good enough.

MR. JERRELL: About is fine. Yeah. Your Honor, do you mind if I move my chair over there?

THE COURT: No.

(Tape started.)

MR. JERRELL: Your Honor was Exhibit 62 admitted?

THE COURT: I don't know what Exhibit 62 is.

MR. JERRELL: Stipulation of gunshot residue.

THE COURT: Everything has been admitted except the one photograph. Everything except the one photograph. I hope the whole twenty-one minutes isn't going to be this.

MR. JERRELL: It will start at 224, but I am scared to try to fast forward the thing.

Q. Now, Officer, that was hard to hear. Was that Mr. Brooks outside the door with yourself?

THE COURT: Step over by TV. You are going to have a hard time seeing from there. I don't know if it's going to help you to be able to see.

A. Yes. That's Mr. Brooks and myself.

Q. (By Mr. Jerrell) And do you, because it was hard to hear what was he saying to you outside the door?

A. He said that there was no domestic– he said that there was no abuse, we

argue, everybody argues, but there was no abuse.

Q. Okay. Is that it?

A. That's it.

Q. All right.

(The following is a transcript from a tape-recorded interview, it was done to the best of my ability based upon the quality of the audio of the tape.)

(Tape started.)

ROBERT BROOKS: Can I call somebody? I don't know what to do. I don't know what to do, you know. Can I call somebody?

DETECTIVE THOMAS: As soon as Mike gets back here, he's got to be there it's their case, they called me to answer the call, so I can't make those decisions.

ROBERT BROOKS: Can I sit down?

DETECTIVE THOMAS: Okay.

ROBERT BROOKS: Where do you want me to sit?

DETECTIVE THOMAS: You can sit there, if you want to sit there.

ROBERT BROOKS: Can I call my daughter? I have got a lot of people to call. I got to call my (inaudible).

DETECTIVE THOMAS: I can't call here, partner. You know that. And like I said, he is in charge.

DETECTIVE PRUNEAU: Go ahead and have a seat right there, Bob.

ROBERT BROOKS: Can I pull it up?

DETECTIVE PRUNEAU: Yeah. That's fine. This is --

(Inaudible).

ROBERT BROOKS: What is that for? I am being booked?

DETECTIVE THOMAS: No, you know the system as well I do. Just in case, so there is no misunderstanding. You are a police officer, I am a police officer, we are just going to advise you of your rights, you know, and you don't have to tell us anything. You are not under arrest, but, you know, just, you know the how the technicalities are nowadays and stuff. And–

ROBERT BROOKS: Well, I am not free to go, am I? Aren't I?

DETECTIVE THOMAS: Correct.

ROBERT BROOKS: Correct?

DETECTIVE THOMAS: Today is the 28th, ain't it? I don't got my cell phone with me, and it's got my date and time on it.

ROBERT BROOKS: Where is the phone number I asked for?

DETECTIVE THOMAS: You are getting it whenever he gets here. I think it's it is 29th now. It's the 29th now, isn't it?

DETECTIVE PRUNEAU: Yeah, the 29th.

DETECTIVE THOMAS: At 2:33.

ROBERT BROOKS: Can I have some more water, please?

DETECTIVE PRUNEAU: Sure.

ROBERT BROOKS: Did you ever get that phone number for me (inaudible). I have nothing to hide.

DETECTIVE THOMAS: And nobody says you do.

ROBERT BROOKS: I you just fucking–just my fucking life. God.

DETECTIVE THOMAS: Robert, before we ask you any questions, you must understand

your rights. You have the right to remain silent. Anything you say can and will be used against you in Court. Do you understand that?

ROBERT BROOKS: (Nodding).

DETECTIVE THOMAS: You have the right to speak to a lawyer attorney and have him with you during questioning. Do you understand that? If you cannot afford a lawyer, one will be appointed for you before any questioning, if you wish. Do you understand that? Can I get you to initial right there on each one of those. Okay. Now read this one here.

ROBERT BROOKS: I got to call somebody. Can't I call somebody? Can I call a phone number or something? I got to talk to somebody.

DETECTIVE PRUNEAU: I have the that – I have the phone number in there. You know, You have been a police officer for how many years, Bob?

ROBERT BROOKS: Seventeen.

DETECTIVE PRUNEAU: So then I think you understand we have to at least do, obviously, to do a little investigation.

ROBERT BROOKS: I understand that. I understand that.

DETECTIVE PRUNEAU: And I think you know that. I mean that's why we are here with you.

ROBERT BROOKS: Correct. Correct.

DETECTIVE PRUNEAU: You know you are a brother-in-law.

ROBERT BROOKS: (Inaudible) reading me my rights, obviously I am a suspect. It's my fucking life.

DETECTIVE PRUNEAU: Well – well, I understand that, but any time, and I think

you – you have been a police officer, after seventeen years, I think you understand that any time there is a shooting, pretty much right off the bat, no matter if it's officer involved, I mean what do they do whenever you get – whenever you are involved in a shooting on the street.

ROBERT BROOKS: I am lost, man. I am lost. I am lost.

DETECTIVE THOMAS: Well, I mean, just that's what we are trying to do figure out what is going on.

DETECTIVE PRUNEAU: Just like you have done it for seventeen years, brother, you get people –

ROBERT BROOKS: I–I got to talk to somebody too. I got to talk to somebody.

DETECTIVE THOMAS: Who do you want to talk to?

ROBERT BROOKS: Give me a phone book, I got to talk to somebody. I got to talk to somebody.

DETECTIVE THOMAS: Who?

ROBERT BROOKS: I don't know.

DETECTIVE THOMAS: Right now it wasn't not so much to ask you questions, as to your version what occurred. I wasn't there. So, I don't know.

ROBERT BROOKS: I don't know.

DETECTIVE THOMAS: So I don't know.

ROBERT BROOKS: Please give me a phone book. Please.

DETECTIVE PRUNEAU: Do you have somebody in particular that you're –

ROBERT BROOKS: I don't know. I asked to speak to that phone number, but you are

entitled to one, you know, I know how it works, you guys. I know that.

DETECTIVE PRUNEAU: Well, here's the thing, Bob. I mean you have been a police officer for seventeen years, correct? And you know – you know the routine. And you know that we have to ask you your side of the story, okay. And –

ROBERT BROOKS: I – give you a statement.

DETECTIVE PRUNEAU: Okay. Here's the thing. I wasn't there, okay. And I know that this is what I called – got called out to.

ROBERT BROOKS: I am not free – am I free to go?

DETECTIVE PRUNEAU: Well, when you – I would like to you to sit and talk to us.

ROBERT BROOKS: Am I free to go; yes or no? Yes or no?

DETECTIVE PRUNEAU: At this point in time? Yes. Okay. At this point in time you are free to go.

ROBERT BROOKS: So I can walk out that door?

DETECTIVE PRUNEAU: If you have to walk out that door, but I would sure like to hear your side of the story, you know.

ROBERT BROOKS: I asked you if I am free to go; yes or no?

DETECTIVE PRUNEAU: Well, as of right now you are. Okay.

ROBERT BROOKS: But if I got up and walked out, then what?

DETECTIVE PRUNEAU: We don't – we are not hearing your side, man. Then I mean if you are not hearing your side, put yourself in my situation, okay?

ROBERT BROOKS: I have been there.

DETECTIVE PRUNEAU: Okay. You have been there, okay. You have been –

ROBERT BROOKS: I have been there several times. I have been on Major Case for how long?

DETECTIVE THOMAS: A few years?

ROBERT BROOKS: Five. Six. Five, six years.

DETECTIVE PRUNEAU: Okay. There you go. And you know this a routine thing. It's not like we are putting you in – I mean you have been there and done it, you know –

ROBERT BROOKS: Are any of these doors open?

DETECTIVE PRUNEAU: I can open it right it up now.

ROBERT BROOKS: Is the back door open? Am I free to go out that door?

DETECTIVE PRUNEAU: You are free to go out that door. If you want to walk out that door and not tell us your side of the story, you are free to go. Okay. I will open that door, and you can walk right on out, brother.

ROBERT BROOKS: I don't have nothing to hide. (Inaudible).

DETECTIVE THOMAS: And that's your story. And that's your version of what occurred?

DETECTIVE PRUNEAU: I don't think you have nothing to hide. This is what –

ROBERT BROOKS: I am being stressed.

DETECTIVE PRUNEAU: I understand.

ROBERT BROOKS: No, you don't understand. I am stressed. What do you do? What do you do? Are you married?

DETECTIVE PRUNEAU: Yeah.

ROBERT BROOKS: What do you do with your wife? Ask anybody, what we did, everything, we did everything together. Everything. Ever - every fucking little old only thing, we did. The only thing we did separate, we worked. Everything. We did everything together. She is – now she is fucking gone. God. God. Can I call somebody? I just want – I am not – you can sit right here – you can guys can sit here.

DETECTIVE PRUNEAU: Who do you need to call? I want -

ROBERT BROOKS: I would to call Michael. Talk to my buddy Michael. You know Michael.

DETECTIVE THOMAS: Michael?

ROBERT BROOKS: Tetrall (sic).

DETECTIVE PRUNEAU: Is he on the Major Case Squad?

ROBERT BROOKS: She was my fucking life, the rest of my life. Am I going to be able to do the things I used to do? No. Because you know why, because I am going to be thinking about her. Because we did all that. We did all that.

DETECTIVE THOMAS: So what happened?

ROBERT BROOKS: Terry. Terry, it's not – there is nothing – I just –

DETECTIVE THOMAS: You can make a phone call. We are not telling you can't make a phone call.

ROBERT BROOKS: I can't call, I don't have no number. I don't know where it is. You got some water?

DETECTIVE PRUNEAU: Yeah, we got some over there.

ROBERT BROOKS: Wherever. I was sitting.

DETECTIVE THOMAS: He's getting the number. (Inaudible).

ROBERT BROOKS: What?

DETECTIVE THOMAS: Robert, I don't know what happened. All I want to do is find out what happened. And you know as well I do that when officers are first on the scene, they are coming in, they are getting their statements, you are giving a statement, we weren't there, you are upset, things were going on, so you have been doing this for years.

ROBERT BROOKS: I don't know why you are doing this.

DETECTIVE THOMAS: You have been doing this as a Detective. All we are trying to do is –

ROBERT BROOKS: I was going – the rest of my life with this. This is bullshit. Where is my daughter? Terry, where is my family members?

DETECTIVE THOMAS: I have not seen them.

ROBERT BROOKS: Why are they talking to her?

DETECTIVE THOMAS: I have no idea. I have not seen her. I don't know even where she is at. I don't know if she is still at the house or the neighbor's or what. I have no idea. When you saw me, I pulled up, and I drove up here to the station. I – I don't know what is going on.

ROBERT BROOKS: I need a regular phone book. I don't know the Twin City – can I get a regular phone book? I know you guys got –

DETECTIVE THOMAS: For St. Louis?

ROBERT BROOKS: Yes.

DETECTIVE THOMAS: I don't know if we got one back here or not. What year is that?

ROBERT BROOKS: (Inaudible).

DETECTIVE THOMAS: What is his name?

ROBERT BROOKS: Michael Tetrall.

DETECTIVE THOMAS: Is that –

ROBERT BROOKS: Got a little bit. You know as well as I do, if I got up and walked out that door, you are going to lock me up.

DETECTIVE THOMAS: For what?

ROBERT BROOKS: Who knows for what. I am not free to go.

DETECTIVE THOMAS: We told you you were free to go.

ROBERT BROOKS: But you know what, Terry, I want to – what do you do, man? I don't have nothing to hide. I didn't do nothing at all.

DETECTIVE THOMAS: What are you worried about?

ROBERT BROOKS: Because she is fucking gone. She is gone, Terry. She is gone. She is fucking gone. I love her.

DETECTIVE THOMAS: You can't hide that part.

ROBERT BROOKS: You haven't been to my house. They ever been to my house?

DETECTIVE THOMAS: I have no idea. Like I said, I work at Pevely, they are with Crystal, they called me to help. And I walked up to see you coming out of the house, and I drive down here to the station. I don't know what is going on. You know, there is officers doing this, there is officers doing that, and officers doing something else. I did the gunshot residue on your hand back here. You know, that's my part. That's all I have seen,

done, or heard. They make these books too dog-gone small.

ROBERT BROOKS: Can somebody see if they are out in the lobby?

DETECTIVE THOMAS: There is a Michael in here, but it's a 469-3025.

ROBERT BROOKS: I don't know what it is.

DETECTIVE THOMAS: Hum?

ROBERT BROOKS: It's on that piece of paper they won't let me get it. They give to them, that telephone there.

DETECTIVE THOMAS: You also have to understand that, you know, he's a Detective with Crystal City Police Department, he's got a lot of things going, a lot of people calling him back and forth right now. Because there is a lot of things going on. So he is wearing a lot of hats right now. I have got the easy part, I am just called from another agency to come down and assist, so. He has got Chief calling him. He's got the Captain calling him. He has got the Corporal calling him. He's got the officers calling him. So he is back and forth trying to figure out what is going on. So it takes him a little bit of time and –

ROBERT BROOKS: Can I walk to the rest room with me, please? Can I get some more water too?

(Leave interview room)

(Conversation out of site of camera)

UNIDENTIFIED OFFICER: Can you have a seat in here, please?

ROBERT BROOKS: Yeah. Thanks.

(Re-enter the interview room)

ROBERT BROOKS: Can I talk to somebody?

DETECTIVE PRUNEAU: Here's the situation, okay. You have been there, you have been Major Case, okay. And I mean how many years have you done it for?

ROBERT BROOKS: Five or six.

DETECTIVE PRUNEAU: Five or six years. Okay. We need our time line, and we need your story on what happened, okay. You've done this, you have done it for seventeen years. If you don't do anything, you know good and well that you can tell us what happened.

ROBERT BROOKS: I don't now, man. I just – I am lost right now, brother.

DETECTIVE PRUNEAU: Well, I understand.

ROBERT BROOKS: I've lost everything.

DETECTIVE PRUNEAU: But you haven't lost everything. You still have your daughter, okay. And you got that–you got any other kids, or just her?

ROBERT BROOKS: No. No, just step mom. Or you know.

DETECTIVE PRUNEAU: That was her step mom?

ROBERT BROOKS: Yeah. Going to be.

DETECTIVE PRUNEAU: And you have to understand that, I mean it's not like I am here's the thing, okay I am just going to lay it right on the line, I mean, you know, you have done it for seventeen years, man. Seventeen years. You have been in Major Case for six, okay. So if you had nothing to do–if you didn't do anything, right now I am going on, we have a victim with a gunshot wound, okay. And you have to understand – you understand where I come from, because you are police officer, you

know, you are just like me. You have done this. You have done this tons of times, okay.

ROBERT BROOKS: Is my mom out there?

DETECTIVE THOMAS: She is out there right now.

DETECTIVE PRUNEAU: She is out there, I don't know if it's your mom. There is somebody there.

ROBERT BROOKS: Is it Big Mike – (Inaudible).

DETECTIVE PRUNEAU: No, there was just a female out there whenever I looked out.

ROBERT BROOKS: My mom?

DETECTIVE PRUNEAU: Okay. I don't know if it was your mom, or who it was, but there was a female out there, whenever I looked out into the hall.

But here's the thing, Bob, and I keep saying this, I need, because I am – I am one of the investigators on here, okay? And you know this. You have been there. You have don't it. You know how it goes. And you know – you know, whenever we talk to somebody and we hey listen, what is your side. And when we don't get cooperation –

ROBERT BROOKS: I am not – I am just lost, man. I am just lost.

DETECTIVE PRUNEAU: I understand you being lost, man, but I mean that's you being lost is not doing your daughter any good. Not doing you any good. Not doing us any good. I at least have to have somewhere to go and say hey, you know what, this is what he is saying happened. You know, when I got to woke up at–when I get woke up at quarter to 1:00, there was an accidental shooting, up at Harbor Pointe, a guy accidentally shot his

wife, thought it was an intruder, that's all I know. I haven't talked – the only people I talked to since then has been my Captain, Terry, I haven't even talked to the two guys you were by except in passing, the one – the one up there in the uniform, that's the only two people I talked to, okay? And I went in there and saw your wife, okay. And – and as far as I know, you know, that's all I know. I don't know anything else. And being that I'm from Crystal City, I am one of the lead investigators on this case, okay? So I mean it's going to be hard for me to defend you, being a police officer and saying hey, you know what he didn't cooperate, and he didn't tell me this. You know that. So I need to hear from you what happened. Did you work tonight?

ROBERT BROOKS: (Nodding).

DETECTIVE PRUNEAU: What time did you get off?

ROBERT BROOKS: I don't know. Where is mind – I don't know where my mind is at. Oh, God. I am tired. I don't know.

DETECTIVE PRUNEAU: From what the dispatch told me, okay, from what the dispatch told me, I guess you called 9-1-1?

ROBERT BROOKS: Yes, sir. I did.

DETECTIVE PRUNEAU: Okay. They said that – on the tape they said that you actually you accidentally [sic] shot your wife –

ROBERT BROOKS: Can I have some more water, please?

DETECTIVE PRUNEAU: That you accidently shot your wife, and you thought she was an intruder, correct?

ROBERT BROOKS: Are you going to bring her back?

DETECTIVE PRUNEAU: Am I?

ROBERT BROOKS: Is she going to come back? Is she going to come back?

DETECTIVE PRUNEAU: You know that as much as I would like to say yes she is, I can't do that. And you know that. And I wish I could do that for you, brother.

DETECTIVE THOMAS: Let's go back and put this together. What time did you go to work today?

ROBERT BROOKS: This morning, Terry.

DETECTIVE THOMAS: Do you work days or evenings?

ROBERT BROOKS: I work secondary. I work every night. I am always gone.

DETECTIVE THOMAS: Okay. Did you work at the station today, or did you work secondary?

ROBERT BROOKS: Listen, I am not being difficult, guys. Seriously. I know how it works. I know, you know, Terry, she is gone. I don't know. I don't know. I need to talk to somebody. Can I get a phone book?

DETECTIVE PRUNEAU: There is one right there.

ROBERT BROOKS: No, it's not. I need a phone book. St. Louis phone book. Or something.

DETECTIVE PRUNEAU: Who are you calling?

(Tape stopped.)

Q. (Mr. Jerrell) Now Officer, some time after this point was Mr. Brooks placed under arrest for suspicion – suspicion of homicide?

A. Yes.

Q. And after this point – strike that. Do you see Robert Brooks in the courtroom?

A. Yes, I do.

Q. And would you please point him out for the jury?

A. He is in the tan jacket with the burgundy shirt and tie.

[Trial transcript, p. 208, beginning with line 1:]

[The following are questions about a tape recording that captured some of Mr. Brooks's statements at the scene, while Mr. Brooks was on the telephone with Lieutenant Mike Tetrall:]

Q. Is he talking to someone on the phone at this time?

A. Yes.

Q. Who is that?

A. Michael.

Q. And did you identify Michael later on in your investigation?

A. Yes, sir.

Q. And who is he?

A. Lieutenant Mike Tetrall with the Jennings Police Department.

Q. All right.

(Tape resumed).

(Tape stopped at 104:56).

Q. Officer, that was a little hard to hear.

A. We were arguing at first, Michael, about forty minutes, forty-five minutes.

No. 09-1492

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,

Petitioner,

v.

ROBERT R. BROOKS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH F. YECKEL
Counsel of Record
Law Office of Joseph F. Yeckel, LLC
116 E. Lockwood Ave.
St. Louis, MO 63119
(314) 227-2430
joe@yeckel-law.com

QUESTION PRESENTED

Whether a criminal defendant who makes a non-substantive post-*Miranda* statement generally denying culpability was deprived of due process in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976), where the prosecutor treated the statement as silence and repeatedly commented on, and adduced evidence of, that silence before the defendant invoked his right to remain silent.

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OPINIONS BELOW

The opinion of the Missouri Supreme Court (Pet. App. A1-A17) is reported at 304 S.W.3d 130. The opinion of the Missouri Court of Appeals (Pet. App. A18-A27) is not reported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT

In *Doyle v. Ohio*, the Court declared it "fundamentally unfair and a deprivation of due process" to allow the prosecution to impeach a defendant's testimony with post-*Miranda* silence. 426 U.S. 610, 618 (1976). The assurance implicit in the *Miranda* warnings—that "silence will carry no penalty"—served as the basis for the Court's ruling. *Id.* The Court concluded that "every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." *Id.* at 617. Consequently, the Court declared "it does not comport with due process to permit the prosecutor during the trial to call attention to [the defendant's] silence at the time of arrest and insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony." *Id.* at 619 (quoting *United States v. Hale*, 422 U.S. 171, 182-83 (1975) (White, J., concurring)).

Four years later, the Court held that *Doyle* does not apply to impeachment of a defendant's testimony with inconsistent post-*Miranda* statements. *Anderson v. Charles*, 447 U.S. 404, 408 (1980). Allowing the prosecution to impeach a defendant in this manner does not violate due process, the Court explained, because "[a]s to the subject matter of those statements, the defendant has not remained silent at all." *Id.* But the Court cautioned that prosecutors who wish to inquire about post-*Miranda* statements must do so in a manner that does not emphasize the

defendant's silence. "*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements" as long as the questions are "not designed to draw meaning from silence." *Id.*

In this case, the Missouri Supreme Court held that the prosecution repeatedly violated *Doyle* in all phases of the trial by treating Respondent Robert Brooks' post *Miranda* non-substantive statements as silence and emphasizing his failure to provide an exculpatory story after he had been Mirandized.

A. Factual Background

On August 29, 2006, Amanda Cates was shot and fatally wounded. Robert Brooks, her fiancé and a local police officer, was arrested for suspicion of homicide. Tr. 569, 591.

There were no independent eyewitnesses to the shooting. Tr. 534, 637. The petitioner and Mr. Brooks agreed that the gun went off during an argument between Mr. Brooks and Ms. Cates but offered different explanations for the shooting at trial.

The prosecution's theory was that Mr. Brooks intentionally shot Ms. Cates from a distance of several yards. Tr. 724. Mr. Brooks, on the other hand, claimed he acted in self-defense. Tr. 631. He maintained that Ms. Cates grabbed his gun during a heated argument, placed her finger on the trigger, and pointed the gun at him. Tr. 629-31. Mr. Brooks tried to disarm her, and they wrestled over the gun.

Tr. 630-32. The gun discharged during the struggle, and a bullet hit Ms. Cates. Tr. 632-33.

Police officers responding to an emergency call arrived around 12:30 a.m. Tr. 184, 196. They observed that Mr. Brooks was frantic, crying, and hysterical. Tr. 194, 213. Once the police had secured the scene, Mr. Brooks was transported to the police station for questioning. Tr. 528-29. After administering the *Miranda* warnings to Mr. Brooks, Lieutenant Thomas and Detective Pruneau interviewed Mr. Brooks to "try to get his side of the story." Tr. 529, 536, 570. The interview was video recorded, and the prosecution played twenty-six minutes of the recording at trial. Tr. 548-49; Exh. 64.

- **The Police Interrogate Mr. Brooks.**

At approximately 2:28 a.m., Lieutenant Thomas advised Mr. Brooks of his *Miranda* rights. Exh. 64. Lieutenant Thomas and Detective Pruneau repeatedly asked Mr. Brooks to tell them how the shooting occurred. Exh. 64; Tr. 555-67. Mr. Brooks did not answer these questions and did not offer his account of the shooting.

The portion of the interview played for the jury showed the following exchanges between the officers and Mr. Brooks:

> THOMAS: *Right now it wasn't not [sic] so much to ask you questions, as to [sic] your version what occurred.* I wasn't there, so I don't know.
>
> BROOKS: I don't know.

Tr. 555 (emphasis added).[1]

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[1] As Mr. Brooks pointed out to the Missouri Supreme Court, portions of the interview were transcribed inaccurately. The recording of the interrogation established that Mr. Brooks did not say

* * *

PRUNEAU: If you have to walk out that door, but *I would sure like to hear your side of the story, you know.*
BROOKS: I asked you if I am free to go, yes or no?

Tr. 556 (emphasis added)

* * *

PRUNEAU: We don't—*we are not hearing your side, man.* Then I mean *if you are not hearing your side, put yourself in my situation okay?*
BROOKS: I have been there.

Tr. 557 (emphasis added)

* * *

PRUNEAU: *So what happened?*
BROOKS: Terry, Terry, it's not—there is nothing—I just—
THOMAS: You can make a phone call. We are not telling you can't make a phone call.
BROOKS: I can't call, I don't have no number. I don't know where it is. You got some water?

Tr. 559 (emphasis added)

* * *

"I don't know" when asked to explain what happened. According to the recording played in court, Mr. Brooks stated "I know," acknowledging his agreement that Lieutenant Thomas didn't witness the shooting:

THOMAS: Right now it wasn't so much to ask you questions as to [sic] your version of what occurred. [Inaudible] I wasn't there—
BROOKS: I know.
THOMAS: —So, I don't know.
BROOKS: Please give me a phone book. Please.

Exh. 64 (Timer 2:30:40 – 2:31:08).

THOMAS *Robert, I don't know what happened. All I want to do is find out what happened.* And you know as well as I do that when officers are first on the scene, they are coming in, they are getting their statements, you are giving a statement, we weren't there, you are upset, things were going on, so you have been doing this for years.

BROOKS I don't know why you are doing this.

THOMAS You have been doing this as a Detective. All we are trying to do is—

BROOKS I was going—the rest of my life with this. This is bullshit. Where is my daughter? Terry, where is [sic] my family members?

Tr. 560 (emphasis added).

* * *

PRUNEAU: . . . We need our time line, and *we need your story on what happened, okay? You've done this, you have done it for seventeen years. If you don't do anything, you know good and well that you can tell us what happened.*

BROOKS I don't know, man. I just—I am lost right now, brother.[4]

PRUNEAU: Well, I understand.

BROOKS I've lost everything.

Tr. 564 (emphasis added).

* * *

---

[4] The transcript does not accurately reproduce this exchange. According to the recording played for the jury, the exchange went as follows:

PRUNEAU We need *your* time line, and we need your story on what happened, okay? You've done this, you have done it for seventeen years. If you *didn't* do anything, you know good and well that you can tell us what happened.

BROOKS *[Inaudible]*. I just—I am lost right now, brother.

Exh. 64 (beginning at 21 minutes and 32 seconds into the recording or 2:44 a.m. according to the video timer) (emphasis added).

PRUNEAU: . . . . But here's the thing, Bob, and I keep saying this, I need, because I am—I am one of the investigators on here, okay? And you know this. You have been there. You have [done] it. ***You know how it goes. And you know—you know, whenever we talk to somebody and we hey listen, what is your side. And when we don't get cooperation—***[3]

BROOKS: I am not—I am just lost, man. I am just lost.

PRUNEAU: I understand you being lost, man, but I mean that's you being lost is not doing your daughter any good. Not doing you any good. Not doing us any good. ***I at least have to have somewhere to go and say hey, you know what, this is what he is saying happened.*** . . . [W]hen I get woke up at quarter to 1:00, there was an accidental shooting, up at Harbor Pointe, a guy accidentally shot his wife, thought it was an intruder, that's all I know. . . . ***So I mean it's going to be hard for me to defend you, being a police officer and saying hey, you know what he didn't cooperate, and he didn't tell me this. You know that. So I need to hear from you what happened.***. . . .

Tr. 566-67 (emphasis added).

During the interview, Mr. Brooks asked the officers if he was under arrest or free to go. Tr. 551, 556, 561. After being told he was free to go, Mr. Brooks decided to stay, stating: "I don't have nothing to hide. I didn't do nothing at all." Tr. 562. Twenty-six minutes into the interrogation, Mr. Brooks invoked his right to remain silent, and the officers stopped questioning him. Pet. 9 n.3; Tr. 163. Mr. Brooks did not discuss the shooting or inform the officers of the factual basis of the defense he would present at trial. Tr. 570-71; Exh. 64.

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[3] The transcript omits the word "say" which is audible on the recording. Detective Pruneau said: "[Y]ou know, whenever we talk to somebody and we *say* hey listen, what is your side. And when we don't get cooperation—" Exh. 64 (beginning at 23 minutes and 34 seconds into the recording or 2:46:04 a.m. according to the video timer).

- **The Prosecutor Comments on, and Adduces Evidence Regarding, Mr. Brooks' Post-*Miranda* Refusal to Tell the Police his Version of the Shooting**

Throughout the trial, the prosecutor attacked Mr. Brooks' credibility and argued that he was culpable in the shooting due to his refusal to tell the officers how Ms. Cates was shot. In opening statement, the prosecutor accused Mr. Brooks of failing to cooperate with the police based on his refusal to provide his account of the shooting after he had been advised of his *Miranda* rights:

> And basically ***all they did was ask him what happened, what happened, Bob. He never would tell them. Not a word. Not a word.*** I need to talk to somebody is what he said, or I need a phone book. They gave him a phone book. Then he needs a phone number. They gave him a phone number. ***Then they say we want your side of the story,*** you are not under arrest, you are free to go, open the door and you are free to walk out of here. ***Over and over and over. You will see them ask him him [sic] and he just tells—they didn't interrogate him like they do most people, they said just tell us what happened. Not a word. Never told them that he thought she was an intruder and accidentally shot her. He never told them anything.*** That's going to last close to an hour or so. And then finally, you know, finally he says I am done. At that point he is pretty well a suspect at that point, so they place him under arrest. And I will have to cut [the tape] off at that point because ***he invokes his rights,*** so at that point I got to turn it off.
>
> * * *
>
> ***The evidence will show that for a good part of an hour, after repeatedly asking what happened, and he would not tell them.***

Tr. 162-63, 168 (emphasis added).

The prosecutor referred to Mr. Brooks' post-*Miranda* silence in his direct examination of Lieutenant Thomas. The questioning established that after he had been advised of his *Miranda* rights, Mr. Brooks refused to offer his account of the shooting:

Q. Did he, during the interview time period, ever tell you what happened?
A. No, he did not.
Q. Did he ever give you an answer?
A. No.

* * *

Q. Do you know of any law enforcement officers who ever, while being questioned or not being questioned, he ever told what happened?
A. No.

* * *

Q. At any time during the interview did he say it was an accident?
A. No.
Q. At any time during the interview did he say they are fighting over the gun?
A. No.
Q. Did he ever give you any explanation during the interview as to what had actually taken place?

* * *

Q. Prior to any arrest, did he ever tell you what happened?
A. No.

Tr. 536-37, 540, 548.

While Lieutenant Thomas was on the stand, the prosecutor played the video recording of Mr. Brooks' interview. Tr. 549-69; Exh. 64. As previously stated, the recording showed several instances of Lieutenant Thomas and Detective Pruneau

pressing Mr. Brooks to relate his side of the story and Mr. Brooks not answering their questions. *See supra* 4-7. The prosecutor never drew attention to the fact that Mr. Brooks said he "had nothing to hide" and "didn't do nothing at all."

Resuming his examination of Lieutenant Thomas, the prosecutor returned to the subject of Mr. Brooks' failure to talk about the shooting in the interview conducted after he had been read his *Miranda* rights.

Q. Now, prior to his arrest did [Mr. Brooks] ever mention that they had been arguing for twenty to forty-five minutes?
A. No.
Q. Prior to his arrest, did he ever say that he told her to quit?
A. No.
Q. Prior to his arrest, did he ever say he told her not to get up?
A. No.
Q. Prior to his arrest did he ever say she turned the lights on?
A. No.
Q. Prior to his arrest, did he ever say where he got the gun from?
A. No.
Q. Prior to his arrest, did he ever say that Amanda did anything to make or cause him to shoot her?
A. No.
Q. Prior to his arrest, did he ever give you any type of explanation whatsoever as to what happened?
A. No.

Tr. 570-71.

On cross-examination, Lieutenant Thomas testified that Mr. Brooks "basically said nothing" during the interview. Tr. 575-76. In this regard, Lieutenant Thomas' testimony was consistent with his prior testimony as well as the prosecutor's theme that Mr. Brooks "never told them anything." Tr. 163.

Mr. Brooks testified that Ms. Cates pointed a gun at him and threatened to kill him, and that the gun went off when he tried to disarm her. Tr. 629-32.

The prosecutor cross-examined Mr. Brooks about his failure to tell the officers who interviewed him how the shooting occurred:

> Q. [B]asically what they asked you was, we just want to know what happened, give us your side of the story. Is that a fair rendition of what they were asking you?
> A. I believe so.
> Q. All right. And you never told them, did you?
> A. Didn't say anything.

Tr. 719. The prosecutor did not dispute Mr. Brooks' characterization of the interview.

On further cross-examination, the prosecutor reiterated that Mr. Brooks had not told the officers that he acted in self-defense as he had testified in support of his claim of self-defense:

> Q. Terry Thomas and Officer Pruneau, prior to your arrest, asked you what happened, you didn't tell them what you told the jury in your Direct Examination, did you?
> A. That's correct.

Tr. 721.

During closing argument, the prosecutor again commented on Mr. Brooks' failure to cooperate with the police. The prosecutor argued:

> ***[I]f it really happened like he said, he would have been screaming it to the walls.*** He wouldn't have started out for the intruder lie. He wouldn't have kept the intruder lie going. He would have changed it when asked.

Tr. 799 (emphasis added).

The jury found Mr. Brooks guilty of second degree murder and armed criminal action. He was sentenced to life imprisonment and a 75-year term, to be served concurrently.

B. Appellate Review

The Missouri Court of Appeals affirmed Mr. Brooks' convictions. Ignoring the fact that the prosecution characterized Mr. Brooks' post-*Miranda* statements as silence and refusals to answer questions, it held that Mr. Brooks waived his right to remain silent by "elect[ing] to respond to questions asked by the interviewing office [sic]." Pet. App. A24.

The Missouri Supreme Court granted Mr. Brooks' transfer application and reversed, holding that the prosecution violated Mr. Brooks' right to due process as established in *Doyle*. The court emphasized that the prosecution claimed at trial that Mr. Brooks' statements that he had "nothing to hide" and "didn't do nothing at all" were non-substantive general denials of culpability that "did not give an account of the struggle or shooting during the interview." Pet. App. A3-A4. The court thus determined that the prosecutor violated *Doyle* by characterizing Mr. Brooks' post-*Miranda* statements as silence and repeatedly commenting on this silence, developing a theme which he repeated in all phases of the trial that "if Brooks was innocent, he would have made an exculpatory statement during the police interview." Pet. App. A14.

REASONS FOR DENYING THE WRIT

The Missouri Supreme Court correctly held that a defendant is denied due process when, as here, the prosecution characterizes a defendant's generalized post-*Miranda* denials and refusals to answer questions as silence and then urges the jury to draw meaning from that across-the-board silence.

This decision does not conflict with any of those that the State of Missouri cites in which courts have found no due process violation. In those cases, the prosecution characterized the defendant's post-*Miranda* statements as substantive in nature and attacked the inconsistencies between those statements and trial testimony. Although Missouri now asserts that Mr. Brooks' statements were substantive in nature and inconsistent with his trial testimony, it never made that claim at trial. Rather, its position was that Mr. Brooks said "[n]ot a word" and "never told them anything." Tr. 163. After being repeatedly "asked what happened," the prosecution continued, "he would not tell them." Pet. App. 168. Under these circumstances, the Missouri Supreme Court properly focused on the prosecution's actual arguments at trial and held that they constituted a straightforward violation of the Due Process Clause.

I. The State Mischaracterizes the Record and the Basis for the Missouri Supreme Court's Holding.

Before addressing Missouri's argument, Mr. Brooks is compelled to point out several misstatements of fact contained in the petition. The petitioner's claim that

the Missouri Supreme Court's decision misapplied *Doyle* and conflicts with other cases depends on these factual misstatements.

Missouri has taken liberties with the record to create the impression that Mr. Brooks provided a detailed post-*Miranda* account of the shooting when he clearly did not. The petitioner repeatedly asserts that Mr. Brooks made a lengthy statement about his role in the shooting after being advised of his *Miranda* rights. The petitioner claims that Mr. Brooks:

- stated he "had done 'nothing' in reference to the killing of his fiancée." Pet. i.
- asserted he "had done 'nothing' in relation to the murder of his fiancée." Pet. 3.
- stated he "had 'nothing to hide' about the murder." Pet. 8.
- maintained he "had done 'nothing' in connection with the murder." Pet. 8.
- made "various exculpatory statements about his conduct in killing his fiancée." Pet. 11.
- offered "statements about his role in the murder." Pet. 13.
- stated "he did not know what had happened." Pet. 17.

These assertions are misleading and not supported by the record. After receiving the *Miranda* warnings, Mr. Brooks did not talk about the facts of the case or provide an exculpatory story. During the interrogation, Mr. Brooks was silent

about everything of substance concerning the shooting. He never mentioned a gun, shooting, fight, struggle, argument, or accident.

In representing that Mr. Brooks said he did "nothing" in relation to the shooting and claimed he "did not know what happened," Missouri mischaracterizes the interrogation. After asking the officers interrogating him whether he was under arrest or free to go, Mr. Brooks stated: "I don't have nothing to hide. I didn't do nothing at all." Pet. App. A41. This statement was not in response to a question inquiring into the shooting. Nor did it concern the circumstances of the shooting or contradict Mr. Brooks' testimony that he was not culpable. And, as previously noted, Mr. Brooks did not say he "did not know what happened" during the interrogation as Missouri maintains. *See supra* 4 n.1.

The petitioner also misstates the record when it asserts that the prosecutor "referr[ed] to those [post-*Miranda*] statements during opening statement, in its case-in-chief, in cross-examining Mr. Brooks, and in closing argument" by "pointing out that Mr. Brooks had ultimately told the police nothing of value during the post-*Miranda* interrogation." Pet. 3. While the prosecutor took the position that Mr. Brooks said nothing of substance during the interrogation, the prosecutor never referred to a post-*Miranda* statement that Missouri now claims concerned the shooting.[4] Rather, the prosecutor repeatedly argued that Mr. Brooks said "[n]ot a word" in response to the police's questioning; "He never told them anything"; "[H]e

[4] In opening statement, the prosecutor stated that Mr. Brooks requested a phone book and a telephone number and expressed his desire to talk to somebody. Tr. 163. The prosecutor also stated that Mr. Brooks invoked his *Miranda* rights. *Id.*

[n]ever g[a]ve you an answer;" "[H]e [n]ever g[a]ve you any explanation during the interview as to what had actually taken place"; "[A]fter repeatedly being asked what happened, he would not tell them." Tr. 163, 168, 536, 540. In other words, the prosecutor focused on Mr. Brooks' refusal to talk to the officers interviewing him and disclose the same exculpatory facts he testified to in support of his claim of self-defense.

Finally, Missouri states that "the fact of [Mr. Brooks'] invocation was not presented to the jury." Pet. 17. This is another assertion in conflict with the record. The prosecutor informed the jury in opening statement that the officers read Mr. Brooks his *Miranda* rights and explained that he would have to stop the video recording of the interrogation because Mr. Brooks "invoke[d] his rights." Tr. 162-63.

II. The Missouri Supreme Court correctly applied *Doyle v. Ohio* and *Anderson v. Charles* in holding that prosecutors may not emphasize a defendant's post-*Miranda* silence to draw an adverse inference of guilt.

Missouri maintains that because Mr. Brooks did not remain completely silent after being advised of his *Miranda* rights, *Doyle* did not preclude the prosecutor from commenting on and adducing evidence of Mr. Brooks' failure to recount each and every detail of the defense he would offer at his trial a year later. One needs to look no further than *Doyle* and *Charles* to refute Missouri's argument.

Missouri's attempt to justify the prosecutor's use of Mr. Brooks' post-*Miranda* silence is based on a fundamental misunderstanding of *Doyle* and its progeny. In

Doyle, a police officer informed Mr. Doyle that he was being arrested for the sale of marijuana and read him the *Miranda* warnings. 426 U.S. at 611. Mr. Doyle made general exculpatory statements denying culpability. He inquired "what's this all about?" and exclaimed "you got to be crazy." *Id.* at 614 n. 5; *Id.* at 622 n.4 (Stevens, J., dissenting). He also asserted that he "didn't know what [the police officer] was talking about." *Id.* at 622 n.4 (Stevens, J., dissenting). Mr. Doyle did not talk about the alleged crime and did not claim he had been framed, the defense he would assert at trial. *Id.* at 613. The Court held that the prosecution violated Mr. Doyle's right to due process when it impeached his "exculpatory story, told for the first time at trial, by cross-examining [him] about his failure to have told the story after receiving *Miranda* warnings." *Id.* at 611, 619-20. In other words, the prosecution violated due process by treating Mr. Doyle's post-*Miranda* statements as "silence" and then asking the jury to draw an adverse inference from that silence. *Id.* at 616, 619.

In *Anderson v. Charles*, the Court clarified that *Doyle* does not prohibit the prosecution from impeaching a defendant based on inconsistencies between his testimony and post-*Miranda* statement. Mr. Charles was arrested while driving a stolen car. *Id.* at 404. The car's owner had been strangled to death less than a week earlier. *Id.* After being advised of his *Miranda* rights, Mr. Charles told a detective that he had stolen the automobile about two miles from the bus station. *Id.* at 405.

At trial, he testified that he stole the automobile from a parking lot next to the bus station, and not two miles away as he had told the detective. *Id.*

Holding that *Doyle* does not bar cross-examination that "merely inquires into prior inconsistent statements," the Court concluded that the prosecutor did not violate Mr. Charles' constitutional rights by cross-examining him about the inconsistency in these statements. *Id.* at 408-09. Specifically, the Court found that the prosecutor did not violate *Doyle* by asking the defendant "why, if [his testimony] were true, he didn't tell the officer that he stole the decedent's car from the tire store parking lot [as he testified] instead of telling him that he took it from the street." *Id.* at 408-09 (alterations in original). The Court determined that this question was not improper because it was designed "to elicit an explanation for a prior inconsistent statement" and not "to draw meaning from silence." *Id.* at 409.

The Missouri Supreme Court's decision is a straightforward application of *Doyle* and is perfectly consistent with *Charles*. Just like the prosecutor in *Doyle*, the prosecutor here construed Mr. Brooks' post-*Miranda* statements as non-substantive silence and asked the jury "to draw meaning from silence." *Id.* The prosecutor never attempted, as the prosecutor in *Charles* did, "to elicit an explanation for a prior inconsistent statement." *Id.*[5]

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[5] Missouri's contention that the Court "ignored" Mr. Doyle's post-*Miranda* statements is at odds with *Doyle* and cases construing *Doyle*. In *Doyle*, both the majority and dissent specifically set forth Mr. Doyle's post-*Miranda* statements. If the Court ignored Mr. Doyle's post-*Miranda* statements, why would the Court have bothered to recite them in detail? And in subsequent cases, the Court did not state that Mr. Doyle had remained completely silent as Missouri insists. Rather, the Court emphasized the generality of his post-*Miranda* statements. *See Greer v. Miller*, 483 U.S. 756, 762 (1987) (noting that the *Doyle* defendants "made no postarrest statements about their involvement in

III. The Missouri Supreme Court's holding is consistent with *Doyle's* objectives.

The State argues that the Missouri Supreme Court's decision "divorces *Doyle* from the interests that the rule in *Doyle* is designed to protect" because "Mr. Brooks was not induced to remain silent by the *Miranda* warnings." Pet. 12. "Instead," the State contends, "Mr. Brooks talked at length with the police officers and made various incomplete and misleading statements about his role in the murder." Pet. 13.[6]

The fundamental flaw in Missouri's argument is that the prosecutor never sought to impeach Mr. Brooks with alleged contradictions between his trial testimony and post-*Miranda* statements. Beginning in his opening statement and continuing to the end of trial, the prosecutor emphasized the fact that Mr. Brooks never said anything to the detectives conducting the interrogation. The prosecutor did not ask Lieutenant Thomas or Mr. Brooks (Detective Pruneau did not testify) about anything Mr. Brooks said during the interview. Instead, the prosecutor concentrated on Mr. Brooks' post-*Miranda* silence by inquiring into an array of things Mr. Brooks did not tell the detectives. This fit the prosecutor's overarching

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the crime"); *Charles*, 447 U.S. at 407 & 407 n.2 (observing that Mr. Doyle's post-*Miranda* statement did not address his "involvement in the crime").

[6] The Missouri Supreme Court's holding is also perfectly consistent with this Court's recent decision in *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010). In that case, this Court held that statements the defendant makes after being Mirandized are admissible so long as he did not clearly invoke his *Miranda* rights. But here, Mr. Brooks did not argue that the prosecution violated his constitutional rights by introducing statements in which he offered non-substantive generalized denials of culpability. The question is whether the prosecution violated Mr. Brooks' right to due process by arguing that those statements amounted to silence and asking the jury to draw adverse inferences from that silence.

theme that if Mr. Brooks was innocent, he would have talked about the shooting and not refused to cooperate with the police. The prosecutor, therefore, gave the jury the firm impression that Mr. Brooks had an obligation to speak and exhibited consciousness of guilt when he refused to tell his story. In urging the jury to infer guilt from Mr. Brooks' failure to tell the detectives that he acted in self-defense, the prosecutor disobeyed *Charles'* admonition to avoid drawing meaning from silence and improperly sought to penalize Mr. Brooks for remaining silent on this subject.

Missouri has sought to distance itself from its trial strategy on appeal. In proceedings in the state appellate courts, Missouri asserted for the first time that Mr. Brooks actually made post-*Miranda* statements about the shooting which waived his *Doyle* claims. Missouri repeats its new theory here. The doctrine of judicial estoppel, however, bars Missouri from asserting this position on appeal as it is diametrically opposed to the one it urged at trial. *Interactive Gift Express, Inc. v. Compuserve Inc.*, 256 F.3d 1323, 1345 (Fed. Cir. 2001).

Missouri also argues that Mr. Brooks' failure to raise self-defense during his interrogation is probative and admissible to attack his credibility because it is "critical information that a person naturally would have been expected to provide." Pet. 18. The Court roundly rejected the same argument in *Doyle* and *Brecht v. Abrahamson*, 507 U.S. 619 (1993), a case Missouri incorrectly states did not involve post-*Miranda* silence. Pet. 18 n.7.

In *Doyle*, the state pleaded "necessity as a justification" for the prosecutor's references to post-*Miranda* silence. 426 U.S. at 616. The state maintained that "the discrepancy between an exculpatory story at trial and silence at time of arrest gives rise to an inference that the story was fabricated somewhere along the way." *Id.* According to the state, "the need to present to the jury all information relevant to the truth of petitioners' exculpatory story fully justifies the cross-examination that is at issue." *Id.* at 617. The Court concluded that the unfairness associated with remarking on a defendant's post-*Miranda* silence outweighed these policy considerations. *Id.* at 617-18.

In *Brecht* the prosecutor cross-examined the petitioner about his post-*Miranda* failure to tell the police the shooting was accidental as he claimed at trial.[7] 507 U.S. at 628-29. The prosecutor's conduct, the Court concluded, violated *Doyle* even though "petitioner had every reason—including to clear his name and preserve

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[7] In *Brecht* the Court observed:

> The State's cross-examination of petitioner included the following exchange:
>
> "Q. In fact the first time you have ever told this story is when you testified here today is it not?
>
> * * *
>
> "A. You mean the story of what actually happened?
> "Q. Yes.
> "A. I knew what happened, I'm just telling it the way it happened, yes. I didn't have a chance to talk with anyone, I didn't want to call somebody from a phone and give up my rights, so I didn't want to talk about it, no sir.
>
> Then on re-cross examination, the State further inquired:
>
> "Q. Did you tell anyone about what happened in Alma?
> "A. No I did not."

507 U.S. at 625 n.2 (internal citations omitted).

evidence supporting his version of the events –to offer his account immediately following the shooting" if the shooting had been accidental. *Id.* The prosecutor "crossed the *Doyle* line" by referring "to the petitioner's silence after [he was advised of his *Miranda* rights], or more generally to petitioner's failure to come forward with his version of events at any time before trial." *Id.*[8] In *Brooks*, the prosecutor engaged in the same misconduct when he cross-examined Mr. Brooks regarding his post-*Miranda* failure to volunteer the account of the shooting that he presented to the jury. Tr. 721.

IV. The Missouri Supreme Court's decision is consistent with decisions of federal circuit courts and state courts of last resort.

The petitioner contends that the Missouri Supreme Court's decisions conflicts with other lower court decisions in two ways. Neither contention, however, is correct.

First, Missouri cites several cases that it claims "allowed the State to highlight omissions in a defendant's post-*Miranda* statements." Pet. 19. A careful review of these cases reveals that they are distinguishable and not in conflict with the Missouri Supreme Court's decision. In most of the cases, the defendant told the police a detailed post-*Miranda* exculpatory story and contradicted that story in his or her trial testimony. In each of the cases, the prosecution argued that the

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[8] The Justices unanimously agreed that the prosecution's references to the petitioner's post-*Miranda* failure to claim the shooting was accidental violated *Doyle*. *Brecht*, 507 U.S. at 640 (Stevens, J., concurring) ("Although Members of the Court have disagreed about the seriousness of the due process violation identified in [*Doyle*], in this case we unanimously agree that a constitutional violation occurred . . . .").

defendant made a substantive post-*Miranda* statement concerning the alleged crime, and the prosecution argued that that statement—not silence—had meaning. Because Mr. Brooks did not talk about the shooting during his post-*Miranda* interview and the prosecution asked the jury to draw meaning from Mr. Brooks' silence, these cases are inapposite.

In *State v. Bell*, 931 A.2d 198, 207 (Conn. 2007), the court stated that the defendant was read his *Miranda* rights and "proceeded with the interview." The court did not indicate what the defendant said about the shooting. At the conclusion of the interview, the defendant said "he could provide no further information." *Id.* at 208. Contrary to that representation, the defendant testified that his cousin was present at the scene of the shooting and likely was the shooter, details he had not mentioned in his post-*Miranda* statement. *Id.* The court held that *Doyle* was not violated because the prosecution cross-examined the defendant regarding "selective omissions" from a post-*Miranda* statement which concerned "the subject matter of the crime." *Id.* at 212. It did not urge the jury, as the prosecution did here, to draw meaning from that silence.

In *People v. McReavy*, 462 N.W.2d 1, 4 (Mich. 1990), the defendant agreed to speak to the police and made a series of inculpatory post-*Miranda* statements regarding his involvement in a robbery. He discussed custody issues he was experiencing with his daughter, "a subject the robber had also discussed with his victim." *Id.* When asked about the robbery, the defendant "put his head in his

hands and looked down" and "didn't respond yes or no to those questions." *Id.* When asked "whether he had borrowed the gun used in the robbery from his landlord, the defendant denied that his landlord had loaned him the gun." *Id.* at 5. Next, the officers asked him if he was denying that he committed the robbery, the defendant answered, "no." *Id.* The defendant then said "he did not want to answer any more questions about the robbery." *Id.* He asked the officers to "contact him in the morning" at which time he promised to "clear up the robbery." *Id.* The court held that *Doyle* was not violated because the prosecution argued that the fact that the defendant "answered some questions but not others" showed knowledge of the crime. *Id.* at 5, 8. The prosecution did not characterize the defendant as silent or ascribe significance to any silence.

The other cases Missouri cites follow this same mold. *See United States v. Ochoa-Sanchez*, 676 F.2d 1283, 1287 (9th Cir. 1983) (finding that the prosecutor was not "attempting to draw meaning from silence" because the defendant's post-*Miranda* statement and his trial testimony were "quite different" and the "questioning clearly related specifically to details that defendant offered at trial but failed to reveal at the time of arrest"); *State v. Henry*, 863 P.2d 861, 872 (Ariz. 1993) (prosecution legitimately argued that the defendant's post-*Miranda* statements and trial testimony were "vastly different from one another"); *People v. Osband*, 919 P.2d 640, 694 (Cal. 1996) (there was no error in the prosecutor's "questioning him about his prior inconsistent statements" where defendant denied visiting location of

crime in post-*Miranda* statement and contradicted that assertion at trial); *Wade v. Commonwealth*, 724 S.W.2d 207, 209 (Ky. 1986) (the prosecution cross-examined the defendant about "important matters of substance" that he mentioned in his testimony but had not included in his post-*Miranda* statement; no *Doyle* violation because the defendant made a post-*Miranda* statement "explaining his actions" and the prosecutor limited his cross-examination to the differences between the defendant's post-*Miranda* statement and testimony); *State v. Parker*, 585 N.W.2d 398, 401-02 (Minn. 1998) (no *Doyle* violation because prosecution argued that defendant's post-*Miranda* statements were inconsistent with his trial testimony, not that defendant had refused to answer questions); *State v. Mitchell*, 346 S.E.2d 458, 460-62 (N.C. 1986) (same).

Second, the petitioner argues that the Missouri Supreme Court's decision conflicts with other courts because the Missouri Supreme Court "has apparently adopted a stringent rule requiring that post-*Miranda* statements be expressly contradicted by subsequent trial testimony before such statements can be used by the State in any fashion." Pet. 24. But the Missouri Supreme Court has not adopted a rule that prohibits the admission of a defendant's post-*Miranda* ***statements***. The court held merely when the prosecution characterizes the defendant's post-*Miranda* statements as "[n]ot a word" and "never told them anything" and urges the jury to draw meaning from that silence, the prosecution cannot later defend those

arguments on appeal by claiming that the defendant's statements were actually somehow substantively inconsistent with his trial testimony.

The cases Missouri cites are perfectly consistent with this holding. Those cases conclude that when the prosecution asks the jury to draw meaning from the defendant's silence, the fact that the defendant offered a general denial of guilt in the wake of the *Miranda* warnings does not constitute a waiver of the defendant's *Doyle* claims. *See, e.g., United States v. Caruto*, 532 F.3d 822, 824 (9th Cir. 2008) (finding no waiver where defendant charged with importation and possession of cocaine made post-*Miranda* statement denying knowledge of cocaine in her truck's gas tank); *United States v. Laury*, 985 F.2d 1293, 1299, 1303-04 & n.8 (5th Cir. 1993) (holding that defendant's post-*Miranda* denial of involvement in bank robbery did not authorize prosecutor's reference to defendant's failure to tell the police that he was out of town when the robbery occurred as he testified to at trial in support of alibi defense); *Bass v. Nix*, 909 F.2d 297, 304 & 304 n.11 (8th Cir. 1990) (finding *Doyle* violation even though defendant made post-*Miranda* "general denial of guilt").

In describing the limits the constitution places on the prosecution's use of a defendant's post-*Miranda* silence, the *Bass* court stated:

> The key to the inquiry has always been whether the impeachment was based on post-arrest statements contradicting later trial testimony or whether the impeachment was based on silence contradicting later trial testimony. *Doyle* applies when, as in the instant case, the impeachment was based on silence.

909 F.2d at 304. *See also United States v. Canterbury*, 985 F.2d 483, 486 (10th Cir. 1993) (stating that the prosecution violates *Doyle* where the "focus of the examination" is "not on inconsistent stories as in *Charles [v. Anderson]*, but on [the defendant's] failure to present his exculpatory story at the time of arrest"); *United States v. May*, 52 F.3d 885, 890 (10th Cir. 1995) (finding no *Doyle* violation where "the focus of the prosecutor's comments was not on May's failure to present his exculpatory story at the time of arrest, but on prior inconsistent stories"); *Laury*, 985 F.2d at 1303 (5th Cir. 1993) (holding that defendant's post-*Miranda* statement denying bank robbery but omitting discussion of his whereabouts when crime occurred was not inconsistent with alibi defense asserted at trial and, therefore, did not permit the prosecutor to comment on the defendant's failure to mention alibi defense to FBI agents). The Missouri Supreme Court's ruling is in harmony with these decisions.

V. The Missouri Supreme Court's decision does not unfairly hinder the government's ability to prosecute criminal offenses.

Missouri voices concern that the decision rendered by its highest court will impair its ability to investigate crimes. This fear is unfounded. The court did not, as Missouri contends, hold that the interrogating officer violated *Miranda* and *Doyle* "when he did not stop questioning Mr. Brooks at the moment Mr. Brooks gave evasive and incomplete answers." Pet. 25 (citing Pet. App. A11-A12). What the court found improper was the prosecutor's use and the trial court's admission of

those portions of the video where the officers told Mr. Brooks that he needed to provide an explanation for the shooting and that he would cooperate with them if he was innocent. Pet. App. A11-A12. The court concluded that these "additional comments about Brooks' post-*Miranda* silence" should not have been admitted into evidence. Pet. App. A12.

As the ruling concerned the admissibility of evidence and placed no restrictions on the manner in which law enforcement agents investigate crimes, interrogate suspects, or otherwise perform their duties, Missouri's argument is without merit.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

Joseph F. Yeckel
Counsel of Record
Law Office of Joseph F. Yeckel, LLC
116 E. Lockwood Ave.
St. Louis, MO 63119
(314) 227-2430
joe@yeckel-law.com

Attorney for Respondent

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IN THE

Supreme Court of the United States

STATE OF MISSOURI,
Petitioner,

v.

ROBERT R. BROOKS,
Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of Missouri

REPLY BRIEF

CHRIS KOSTER
Attorney General
SHAUN J MACKELPRANG
Chief Counsel, Criminal Div.
Counsel of Record
P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321
shaun.mackelprang@ago.mo.gov

Attorneys for Petitioner

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PETITIONER'S REPLY

Mr. Brooks takes issue with the State's characterization of the case, accusing the State of misrepresenting "the record and the basis for the Missouri Supreme Court's holding." Opp.Br. 12. Mr. Brooks observes that the prosecutor, at trial, repeatedly stated or argued, and suggested through questioning, that Mr. Brooks had said "Not a word" during his post-*Miranda* interrogation, or, alternatively, that Mr. Brooks (in his post-*Miranda* statement) had failed to mention certain facts that he later testified to at trial. Opp.Br. at 7-10, 13-15. Thus, Mr. Brooks argues that the State was not using his post-*Miranda* statement against him, but, rather, that the State was using his post-*Miranda* silence against him. Opp.Br. 14-15.

I. Mr. Brooks's argument regarding the form of the prosecutor's statements and questions ignores the legal meaning of "silence" under *Doyle*, and it merely urges the Court to adopt a "formalistic" meaning of silence that the Court refused to adopt in *Anderson v. Charles*.

In arguing that the prosecutor's comments and questions did not refer to a post-*Miranda* statement that "concerned the shooting" (Opp.Br. 14), and that the prosecutor instead sought to prove Mr. Brooks's guilt by arguing that Mr. Brooks was silent "across the board" (*see* Opp.Br. 12), Mr. Brooks ignores the context of the prosecutor's comments and questions.

It is true that, in the State's opening statement, the prosecutor said that the evidence would show

that Mr. Brooks said "Not a word" to the officers who questioned him about the murder of his fiancée. App. A6. But, contrary to Mr. Brooks's assertions, the prosecutor did not thereby suggest to the jury that Mr. Brooks was silent "across the board" after the *Miranda* warnings. Rather, the prosecutor also pointed out that Mr. Brooks "said, I need to talk to somebody . . . or I need a phone book." App. A6. And, in fact, while the prosecutor did not at that time detail all of the evasive and nonresponsive answers that Mr. Brooks offered, the prosecutor indicated that the questioning went on for "close to an hour or so." App. A6-A7. Accordingly, it was apparent from the context of the prosecutor's opening statement that, when the prosecutor said that Mr. Brooks had said "Not a word," the prosecutor was merely highlighting the fact that Mr. Brooks had not provided any specific details about the murder. The prosecutor was not trying to suggest that Mr. Brooks remained silent "across the board." Indeed, because Mr. Brooks's entire post-*Miranda* statement was played for the jury (App. A33), this was plainly not a case where the State sought to portray the defendant as silent "across the board" and, thus, guilty.

Of course, had Mr. Brooks actually elected to remain silent, such comments by the prosecutor would have been improper. But because Mr. Brooks made a post-*Miranda* statement (albeit a largely vague, evasive, and non-responsive statement), it was proper for the prosecutor to present the contents of that statement and to highlight Mr. Brooks's failure to provide important details that one would reasonably expect a person to divulge when talking to the police. Mr. Brooks argues that in *Doyle* and *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the Court "roundly rejected" the argument that a person

would "naturally" be expected to divulge the fact that they acted in self-defense. Opp.Br. 19. But Mr. Brooks misunderstands the petitioner's argument. The petitioner's argument is premised on the condition that, when a person elects to talk to the police (and does not elect to remain silent), one would naturally expect that person to claim self-defense if, in fact, a shooting was done in self-defense. In *Doyle*, the defendant elected to remain silent post-*Miranda*, and, in *Abrahamson*, likewise, the defendant elected to remain silent post-*Miranda*. Here, by contrast, Mr. Brooks did not elect to remain silent. To the contrary, Mr. Brooks said that he had "nothing to hide" about the murder; and, accordingly, one would expect Mr. Brooks to be forthcoming in speaking to the police.[1]

Mr. Brooks asserts that the petitioner "has taken liberties with the record to create the impression that Mr. Brooks provided a detailed post-*Miranda* account of the shooting when he clearly did not." Opp.Br. 13. He avers that "The petitioner repeatedly asserts that Mr. Brooks made a lengthy statement about his role in the shooting after being advised of his *Miranda* rights." Opp.Br. 13. But this is plainly incorrect, as the petition made plain that Mr. Brooks did *not* give a detailed account of his role in the murder. Even the question presented plainly stated

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[1] Mr. Brooks faults the petitioner for stating that *Brecht* "did not involve post-*Miranda* silence." Opp.Br. 19. But, in fact, the petition, in referring to a part of *Brecht*, stated that *Brecht* "involved pre-*Miranda* silence." Pet. 18. This was correct, as the part of *Brecht* cited in the petition involved a discussion about pre-*Miranda* silence. *Brecht* also examined evidence of some post-*Miranda* silence that the Court concluded "crossed the *Doyle* line," but the type of evidence discussed there is not at issue here.

that during a lengthy post-*Miranda* interrogation, Mr. Brooks "gave nonresponsive, evasive, and generic exculpatory answers." Pet. *i*. The question further stated that Mr. Brooks had *not* provided "a self-defense account or other important details." Pet. *i*. At other points, the petition reiterated that Mr. Brooks gave nonresponsive, evasive and generic responses, and that Mr. Brooks "told the police nothing of value during the post-*Miranda* interrogation." Pet. 2-3, 8, 11, 13. And, of course, the Appendix to the petition contained a full recitation of Mr. Brooks's post-*Miranda* statement (in which he repeatedly answered questions about the events surrounding the murder by offering nonresponsive and evasive answers). Thus, Mr. Brooks's accusation that the petitioner has taken liberties with the record is not well taken.

In fact, in attempting to make his accusation stronger, Mr. Brooks quotes a part of the petition out of context. Specifically, he asserts that the petition stated that Mr. Brooks "offered 'statements about his role in the murder.' " Opp.Br. 13. What the petition actually stated was that "Mr. Brooks talked at length with the police officers and made various *incomplete and misleading statements* about his role in the murder." Pet. 13 (emphasis added). At no point did the petition suggest that Mr. Brooks actually divulged any details of his conduct; rather, the petition made plain that Mr. Brooks's post-*Miranda* statements were designed to hide his conduct.

It appears that Mr. Brooks is taking issue with the petitioner's view that Mr. Brooks's various answers were made "in reference" or "in relation" or "about" or "in connection with" the murder. But this objection by Mr. Brooks reveals not that the

petitioner has taken "liberties" with the record, but that Mr. Brooks merely disagrees with the petitioner's view of the record. But, while it is understandable that Mr. Brooks would want to maintain that he made no statements "in reference" to the murder, the simple fact is that he did. The police were expressly questioning Mr. Brooks about the murder when Mr. Brooks sought to divert them with his nonresponsive, evasive, and generic claims of innocence and ignorance. *See* App. A33-A47. Thus, when he stated that he had "nothing to hide," Mr. Brooks was not talking about some unknown event or abstract concept—Mr. Brooks was stating that he had "nothing to hide" about the murder.[2]

Mr. Brooks also takes issue with the petition's assertion that "the fact of [Mr. Brooks's] invocation [of his right to remain silent] was not presented to the jury." Opp.Br. 15 (citing Pet. 17). Mr. Brooks points out that the prosecutor, in opening statement, *did* refer to Mr. Brooks's invocation. Opp.Br. 15 (citing Tr. 162-163). But Mr. Brooks is comparing the petition's discussion of what parts of Mr. Brooks's recorded statement were played for the jury with what was said in opening statement.

The petition was correct in pointing out that the portion of the videotape that contained Mr. Brooks's invocation was not played for the jury. *See* App. A47. And, as far as opening statement is concerned, the petition pointed out in a footnote that "the State was not permitted to comment on Mr. Brooks's

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[2] The Missouri Court of Appeals agreed that Mr. Brooks had made a statement about the murder. App. A24 ("The defendant's statement clearly refers to the alleged criminal offense.").

invocation." Pet. 9. This footnote was a reference to the fact that, during the State's opening statement, defense counsel objected to the prosecutor commenting on Mr. Brooks's invocation, and the trial court sustained that objection and instructed the jury to disregard. *See* App. A25 (in a footnote, the Court of Appeals discussed the curative steps taken by the trial court in opening statement). In short, the petition was correct in noting that the State was not permitted to comment on Mr. Brooks's invocation and in stating that the recorded invocation itself was not presented to the jury.

Ultimately, all of Mr. Brooks's attempts to recast the case and accuse the petitioner of misstating the record grow out of Mr. Brooks's contention that he was "silent" about the facts of the murder and, thus, that the State should not have been allowed to use this alleged "silence" against him. He asserts that the Court in *Doyle* has already decided this issue in his favor, and he points out that in *Doyle*, the defendant made a few generic statements at the time of his arrest. But this fact was acknowledged by the petition, and for the reasons set forth in the petition, petitioner believes that *Doyle* did not answer the question presented here.

Mr. Brooks also avers that the Missouri Supreme Court merely properly applied the rule of *Anderson v. Charles*, because "the prosecutor here construed Mr. Brooks' post-*Miranda* statements as non-substantive silence and asked the jury 'to draw meaning from silence.' " Opp.Br. 17. But the prosecutor did not try to draw meaning from post-*Miranda* silence; rather, the prosecutor sought to draw meaning from the incompleteness of Mr. Brooks's post-*Miranda* statement. It is true that this

means that the prosecutor was pointing out omissions (or, in a sense, "silence" within the statement) and drawing meaning from those omissions, but *Anderson v. Charles* expressly stated that such "silence" was not protected, post-*Miranda* silence as contemplated by *Doyle*. *See Anderson v. Charles*, 447 U.S. 404, 409 (1980) ("*Doyle* does not require any such formalistic understanding of 'silence[.]' ").

Mr. Brooks argues that "The fundamental flaw in Missouri's argument is that the prosecutor never sought to impeach Mr. Brooks with alleged contradictions between his trial testimony and post-*Miranda* statements." Opp.Br. 18. He points out that in questioning some of the State's witnesses, the prosecutor did not ask "about anything Mr. Brooks said during the interview," and that, "Instead, the prosecutor concentrated on Mr. Brooks post-*Miranda* silence by inquiring into an array of things Mr. Brooks did not tell the detectives." Opp.Br. 18. But this argument is flawed in at least four respects.

First, although it did serve to impeach Mr. Brooks's later testimony, the primary purpose in questioning the State's witnesses was not to "impeach Mr. Brooks." Rather, it was to show that Mr. Brooks gave another false and incomplete statement once he arrived at the police station. (As outlined in the petition, Mr. Brooks gave several false statements in the immediate aftermath of the murder. Pet. 16-17.) Second, contrary to Mr. Brooks's assertion, the prosecutor did ask about the contents of Mr. Brooks's post-*Miranda* statement, and the entire statement (except for Mr. Brooks's eventual invocation of his rights) was played for the jury. Third, the prosecutor did impeach Mr. Brooks after

Mr. Brooks took the stand and offered his new story that he had acted in self-defense. And, finally, at no point did the prosecutor rely on post-*Miranda* silence to prove guilt or impeach Mr. Brooks's trial testimony. Mr. Brooks insists on referring to the incompleteness of his statement (or his omissions) as "silence," but this formalistic view of silence was rejected in *Anderson v. Charles*.

Mr. Brooks's formalistic view of silence is the basis for his contention that the Missouri Supreme Court's decision is not in conflict with the various conflicting cases cited in the petition. Opp.Br. 21-26. He argues:

> In most of the cases, the defendant told the police a detailed post-*Miranda* exculpatory story and contradicted that story in his or her trial testimony. ... Because Mr. Brooks did not talk about the shooting during his post-*Miranda* interview and the prosecution asked the jury to draw meaning from Mr. Brooks's silence, these cases are inapposite.

Opp.Br. 21-22. But it is Mr. Brooks's formalistic view of silence that leads him to conclude that the prosecutor was commenting on silence. Similarly, Mr. Brooks's focus on the factual differences between the types of post-*Miranda* statements made in the various cases misses the point. If, after receiving the *Miranda* warnings, a defendant makes any type of statement about the crime—generic or detailed—the government should be allowed to use that statement (and any omissions) against the defendant. Indeed, that is precisely what the *Miranda* warnings tell people—that any statements they make can be used against them.

Mr. Brooks avers that the petitioner has "sought to distance itself from its trial strategy on appeal," by asserting "for the first time that Mr. Brooks actually made post-*Miranda* statements about the shooting which waived his *Doyle* claims." Opp.Br. 19. He thus argues that the doctrine of judicial estoppel "bars Missouri from asserting this position on appeal as it is diametrically opposed to the one it urged at trial." But this is incorrect, as the State argued at trial, and on appeal in the Missouri Court of Appeals and the Missouri Supreme Court, that because Mr. Brooks did not remain silent after receiving the *Miranda* warnings, his post-*Miranda* statements (including his selective "silence" about the specifics of his involvement in the murder) could be used against him. Tr. 165-166, 536-548. Moreover, this issue was decided on its merits by the Missouri Supreme Court, and the petitioner is presenting the same arguments here that were presented there.[3]

In sum, the Court should reject the Missouri Supreme Court's view that an evasive and incomplete post-*Miranda* statement is "silence" as that term is contemplated under *Doyle*.

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[3] The only arguments that were not preserved are Mr. Brooks's. He made no objection to most of the alleged *Doyle* violations, and he stated that he had "No objection" to the admission of his post-*Miranda* statement. App. A10-A13, A25-A27. The lack of additional argument in the trial record regarding the State's view on the admissibility of this evidence is directly related to the fact that Mr. Brooks did not object.

II. The Missouri Supreme Court's opinion runs contrary to the recent decision in *Berghuis v. Thompkins*.

Recently, the Court ruled that a defendant, who "was '[l]argely' silent during the interrogation, which lasted about three hours," had not invoked his right to remain silent during that lengthy period of persistent silence. *Berghuis v. Thompkins*, 130 S.Ct. 2250, 2256-57, 59-60 (2010). The Court rejected the defendant's claim that he had invoked his right to remain silent, and the Court held that an invocation of the right to remain silent must be "unambiguous." *Id.* at 2260.

In analyzing the issue, the Court pointed out that "There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously." *Id.* The Court observed that "A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that 'avoid[s] difficulties of proof and ... provide[s] guidance to officers' on how to proceed in the face of ambiguity." *Id.* The Court then pointed out that "If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression 'if they guess wrong.' " *Id.* "Treating an ambiguous or equivocal act, omission, or statement as an invocation of *Miranda* rights 'might add marginally to *Miranda*'s goal of dispelling the compulsion inherent in custodial interrogation[, b]ut as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient

to dispel whatever coercion is inherent in the interrogation process." *Id.*

Here, while this case is not premised upon an alleged *Miranda* violation, many of the same concerns discussed in *Berghuis* are implicated. Indeed, although Mr. Brooks made numerous post-*Miranda* statements (and was not silent at all for a lengthy period of time), the Missouri Supreme Court held that Mr. Brooks's ambiguous, evasive, and equivocal statements—along with his omissions—were the equivalent of post-*Miranda* silence. Thus, the Missouri Supreme Court held that the State should not have been allowed to use Mr. Brooks's "non-substantive" statements against him.

But this is contrary to *Berghuis*, which recognized that "silence" for purposes of *Miranda* must be something other than an "ambiguous act, omission, or statement." And inasmuch as *Doyle* is designed to protect post-*Miranda* silence, it makes little sense to extend *Doyle*'s protective shield to evasive and equivocal statements (and omissions).

As discussed previously in the petition (Pet. 25-27), and as observed by the Court in *Berghuis*, "If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression 'if they guess wrong.' " Here, similarly, police, prosecutors and trial courts will be forced to make more "difficult decisions" when faced with ambiguous, nonresponsive, evasive, or incomplete statements. But a bright-line rule—which states that any post-*Miranda* statements can be used against the defendant—would eliminate such decisions. In

short, the Court should grant the petition so that the Court's *Doyle* cases can be clarified and made consistent with *Berghuis*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHRIS KOSTER
Attorney General

SHAUN J MACKELPRANG
Chief Counsel, Criminal Div.
Counsel of Record

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321
shaun.mackelprang@ago.mo.gov

Attorneys for Petitioner

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